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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

— 76-1799

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

THOMAS F. RYAN, JR.
ROBERT G. HARDY
GALLAGHER, CONNOR AND BOLAND
821 Fifteenth Street, N.W.
Washington, D.C. 20005

Attorneys for Petitioner
Transcontinental Gas Pipe Line Corporation

Of Counsel:

BRIAN E. O'NEILL, *Senior Vice President and General Counsel*
WILLIAM N. BONNER, JR.
Transcontinental Gas Pipe Line Corporation
Post Office Box 1396
Houston, Texas 77001

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v.

FEDERAL POWER COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Transcontinental Gas Pipe Line Corporation (Transco) hereby petitions for a writ of certiorari to review an opinion and order of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion and order of the court of appeals (App. A, *infra,* pp. 1a-22a), its order denying suggestions for rehearing *en banc* on a 4-4 split vote (App. B, *infra,* pp. 23a-24a), and its order denying rehearing (App. C, *infra,* pp. 25a-26a) are not reported.

The court of appeals' initial interlocutory order (App. D, *infra,* pp. 27a-34a), issued August 1, 1975 in this case, is not reported.

This Court's January 19, 1976 opinion granting certiorari, vacating the court of appeals' initial order, and remanding with instructions, is reported at 423 U.S. 326, 96 S. Ct. 579, 46 L.Ed 2d 533 (1976).

The court of appeals' order and memorandum of February 6, 1976 (App. E, *infra,* pp. 35a-43a) remanding to the Federal Power Commission (FPC or Commission) is not reported.

The subsequent order of the Commission (App. F, *infra,* pp. 44a-51a), issued June 25, 1976, is not reported.

JURISDICTION

The opinion and order of the court of appeals (App. A, *infra*) was entered on November 29, 1976. Timely petitions for rehearing and suggestions for rehearing *en banc* were denied by orders issued January 18, 1977 (Apps. B and C, *infra*). By order dated April 14, 1977 in No. A-834, Chief Justice Burger granted an extension of time for filing a petition for writ of certiorari to and including June 17, 1977.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Although the opinion and order of the court of appeals is interlocutory, this Court has jurisdiction to review it by writ of certiorari. Indeed, this Court has previously granted a writ of certiorari with respect to a prior interlocutory order of the court of appeals in this case. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation,* 423 U.S. 326.[2] See

[1] On April 14, 1977, the Commission was granted a like extension for filing a petition for a writ of certiorari in No. A-827. We are advised, however, that the Commission has decided not to seek a writ, as discussed at p. 7, n. 5, *infra.*

[2] Hereinafter cited as *FPC* v. *Transco.*

also, *Forsyth* v. *Hammond,* 166 U.S. 506, 513, 514; *St. Louis, K. C. & C. R.R. Co.* v. *Wabash R.R. Co.,* 217 U.S. 247, 251; *United States* v. *General Motors Corp.,* 323 U.S. 373, 377; *Land* v. *Dollar,* 330 U.S. 731, 734, n.2; *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 685, n.3.

QUESTIONS PRESENTED

1. Whether the court of appeals has once again abused its discretion and overstepped the bounds of proper judicial review by ordering another remand to the Commission, this time for extensive findings "regarding the duration, shape and causation of the alleged [natural gas] shortage on the Transco system".

2. Whether, having established that a natural gas shortage does in fact exist on Transco's system, the "duration, shape and causation" of such shortage has any conceivable bearing on the legality of "compensation" for unequal curtailment under the Natural Gas Act.

STATUTE INVOLVED

Section 19(b) of the Natural Gas Act, 52 Stat. 831, as amended, 15 U.S.C. 717r(b), is set forth in Appendix G, *infra,* pp. 52a-53a.

STATEMENT

1. Over a year and a half ago, this Court determined that "swift and priority consideration" should be given to this case by the court of appeals. *FPC* v. *Transco, supra,* 423 U.S. at 334. Yet, the court of appeals still has not reached the merits of the case, which involves

the lawfulness of a so-called "compensation" provision contained in a curtailment plan of Transco covering natural gas deliveries to Transco's customers for the limited one year period November, 1974 through October, 1975. The point of controversy presented here is the continued insistence of the court of appeals in this case of dictating to the Commission the methods and procedures for determining the reality of the shortage of natural gas on Transco's system.

2. In the prior chapter of this same proceeding, this Court ruled that the court of appeals "overstepped the bounds of its reviewing authority" in "dictating to the agency the methods, procedures and time dimension" of an evidentiary inquiry thought by the court of appeals to be essential to meaningful judicial review of the curtailment compensation provision. *FPC* v. *Transco,* 423 U.S. at 331-333.[3] In remanding to the court of appeals, this Court authorized the lower court either to proceed to decide the case on the merits or, because it was "conceivable" that there was some nexus between the existence of the shortage and the lawfulness of the compensation scheme, to remand to the Commission for adequate findings.

3. The court of appeals opted for the latter course. By its February 6, 1976 decision (Judge MacKinnon dissenting) (App. E, *infra*), the court of appeals concluded that evidence on the shortage was "absolutely essential" to a decision. The court of appeals stated:

> "We do not perceive how we could fairly consider 'the lawfulness of the proposed compensation scheme' unless the Commission has first fulfilled its

[3] The background of that phase of the proceeding is set out in the Court's opinion and will not be repeated here.

> duty to *determine whether a real shortage exists. Thus far the Commission has refused to certify the existence of the shortage* claimed by Transco . . ." (App. E, *infra*, p. 39a) (emphasis supplied).

4. In response to the court of appeals' mandate, the Commission found "that a natural gas supply shortage has in the past and continues to exist on Transco's system" requiring curtailment of service. Order of June 25, 1976 (App. F, *infra,* p. 51a). The Commission's findings and conclusions were based upon a stipulation and agreement among the parties to FPC Docket No. RP75-51 (an investigation of Transco's curtailment situation) which in turn was based upon relevant portions of the record in that case. Such stipulation is set forth as Appendix H, *infra,* pp. 54a-56a. In so confirming the reality of the shortage, the Commission pointed out that "deliverability (the amount of gas capable for delivery in a fixed time period) evidence is more relevant to the issue of need for curtailment than is evidence on total proved reserves." (App. F, *infra,* p. 50a).

5. In its November 29, 1976 opinion and order (App. A, *infra*), the court of appeals concluded that the Commission's order on remand was deficient.[4] Whereas the court in its original order of May 28, 1975 had requested certification of proved reserves and in its February 6, 1976 order (App. E, *infra*) had merely asked the Commission to certify whether "a real shortage exists", the same panel now wanted "to be able to assess the nature, extent and duration of shortage" along certain preconceived lines of inquiry. The court was critical of the fact that the Commission focused on evidence

[4] In this action and all preceding actions on the same subject, the panel was divided 2 to 1.

regarding deliverability rather than reserves, and opined that deliverability evidence:

> "does not necessarily constitute substantial evidence of actual and legitimate long-term shortage if, for example, a pipeline or producer could, by more or less simple acts, make its proved reserves more deliverable." (App. A, *infra,* p. 10a).

The court below also speculated that sizeable reservoirs of gas might "by physically and economically achievable acts" be moved from "possible" or "probable" categories into the category of "proved reserves". Such category of gas was characterized as "provable" reserves, a term heretofore unheard of in the natural gas industry. While the court of appeals conceded that deliverability evidence might suffice as proof of an immediate shortage, it now expressed its belief that the determination of the legality of compensation required a "broader base of information".

In summary, the court of appeals now decided to require answers to sweeping questions looking far into the future, despite the fact that the compensation issue on review is tied to a one year time period (November 15, 1974 through October 31, 1975) long since past.

6. Transco filed a petition for rehearing and a suggestion for rehearing *en banc* (App. I, *infra,* pp. 57a-66a), as did the Commission[5] and several other parties. The suggestions for rehearing *en banc* were denied by virtue of a 4-4 split among the judges of the circuit in regular active service who voted on the case (App. B, *infra*), and the majority of the 3-judge panel, consisting of Chief Judge Bazelon and Judge Edwards (of the Sixth Circuit Court of Appeals), thereupon denied rehearing, with Judge MacKinnon continuing to dissent (App. C, *infra*).

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the propriety of a reviewing court attempting to recast and reshape a lawsuit to fit its own ideas of appropriate issues and areas of inquiry, despite the fact that no private or public party to the case raised such matters or believed that the Commission's determination of the existence of the shortage was inadequate to a resolution of the case. More specifically, Transco submits

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[5] We have been advised that the Commission is not seeking certiorari this time although, as evidenced by the motion for extension of time in No. A-827, the Commission had earlier requested the Solicitor General to seek certiorari in this case. This request to the Solicitor General was recently withdrawn by the Commission after the same court of appeals inexplicably scheduled oral argument in three other pending "compensation" cases without requiring the same gas supply inquiry as is being required by that court in the instant case. Order issued March 29, 1977 in *Elizabethtown Gas Co.* v. *FPC*, D. C. Cir. Nos. 75-1767, *et al.* Although the reasoning for the Commission's sudden change of position will have to be supplied by the Commission itself, the fact that Transco apparently will now be the only pipeline singled out for such an inquiry does not make the judicial interference any less unlawful. Indeed, the actions of the court of appeals cannot in our judgment be reconciled if there is any validity to the court's claim that verification of the shortage is "absolutely essential" to determining the legality of "compensation".

that the court below overstepped the bounds of proper judicial review by imposing its judgment of technical matters upon the expert agency, and by ordering a second remand of the case for "exceptionally complex findings and prophecies"[6] which, under the circumstances, have no possible bearing on the question involved in the lawsuit.

Although the court of appeals couches its latest decision in terms of lack of "substantial evidence", the plain fact is that the court has again dictated to the Commission the methods and procedures for determining the existence of the natural gas shortage on Transco's system.[7] The court of appeals takes no issue with the quantum of evidence used by the Commission to determine that the shortage really exists. Rather, it determines that the Commission went about its inquiry in the wrong way. It disagrees with the Commission (the supposed expert body) that deliverability (the ability of attached wells to produce) is the best test of existence of an actual shortage and then orders the Commission to embark upon a wholly new line of inquiry, one to determine the "duration, shape and causation of the alleged shortage". And in so doing, it tells the Commission that it must look at "provable" reserves, a brand-new term which the court defines as reserves which could become proved through "physically and economically achievable acts lying entirely within the control of a pipeline or a producer". This action by the court of appeals, we submit, constitutes even greater judicial interference with the administrative process than that

[6] As stated by Judge MacKinnon in his dissenting opinion, App. A, *infra*, p. 20a.

[7] In the prior chapter, the court of appeals also dictated the time dimension for the inquiry. Only that element is missing this time.

which this Court overturned in the prior chapter of this case.

First, the court of appeals has ordered a far-reaching inquiry, complete with its own term and definition,[8] into matters which are fraught with inherent uncertainties and which, in any event, are far beyond the power of the agency to control. The "duration" and "shape" of the *future* shortage on Transco's system will require crystal ball gazing of the highest magnitude and will offer little assistance in resolving any issue, much less the issue of the legality of compensation in a curtailment case. Quite obviously, with the Commission having found that the *existing* shortage is genuine, the duration—and we might add, degree—of future shortage will be dependent upon a great many unknowns, the principal one being the amount of new reserves found and dedicated by producers to Transco's system. This, in turn, will be a function of the economics of exploring for and developing new reserves, as well as the existence and magnitude of the reserves in the ground.

By this, we do not intend to suggest that a court could not comprehend the geologic, engineering, economic and regulatory complexities of gas production, but rather that the court of appeals' desire to satisfy

[8] As dissenting Judge MacKinnon aptly stated:

> "Originally the majority were concerned with 'proved reserves' . . . . The majority now expand their prior remand to include so-called 'provable reserves'—not just proved reserves. The industry reports (*id.*) do not refer to any such classification. So unless some industry support can be cited for the term 'provable reserves', it must be concluded that the majority have coined an *ad hoc* definition and gratuitously endowed [illegible] with their own non-scientific trappings." (App. A, *infra*, p. [illegible]16a, n.1).

its curiosity[9] cannot possibly be meaningful, particularly in the context of the powers and responsibilities of the Commission and the judiciary, respectively. One thing is certain, however, and that is that neither the Federal Power Commission nor the court of appeals can force producers to drill wells, which is the only way that gas can be brought to the surface of the earth for transportation by pipelines.[10]

Second, it is inconceivable that the "duration, shape and causation" of the gas shortage, with all of the ne-

[9] "Curiosity" may be an understatement. Judge MacKinnon pointedly observes that the majority of the panel is "apparently obsessed with the idea that there is no actual gas or oil shortage" (App. A, *infra*, p. 15a). Such a notion has no foundation in the record on review and is flatly contrary to this Court's recognition of the energy shortage in prior gas cases. See, *e.g.*, *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, and *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283. And, some *five years ago*, in *Public Service Commission of New York* v. *FPC*, 467 F.2d 361, 371 (D.C. Cir. 1972), the court below took notice of "our national critical shortage of natural gas"; most recently, in *American Public Gas Association* v. *FPC*, ["The Second National Natural Gas Rate Cases"], D.C. Cir. No. 76-2000, *et al.*, decided June 16, 1977, the court of appeals characterized the gas shortage as a "national emergency" (*Slip Op.*, p. 61).

[10] A prime example of the attempt by the court of appeals to interfere with the functions of the expert administrative agency and impose its erroneous notions of the gas industry upon the Commission is found in the following statement:

> "Diminished deliverability does not necessarily constitute substantial evidence of actual and legitimate long-term shortage if, for example, a pipeline or producer could, by more or less simple acts, make its proved reserves more deliverable." (App. A, *infra*, p. 10a).

Since the pipeline has no control over the drilling of wells by its producers, the court's reference to the pipeline is clearly wrong. More fundamentally, however, the statement is totally erroneous, since the way to improve deliverability of proved reserves is to drill more wells in existing fields and while such actions would alleviate the short-term shortage, they would aggravate the long-term shortage by depleting known reserves at a faster rate.

bulous judgments which would attend any such findings,[11] could have any bearing upon the issue of the lawfulness of "compensation" in the context of this case. While it was conceivable that the existence of a true shortage could bear upon the lawfulness of "compensation" as this Court previously determined, we submit that the Commission has now adequately answered that question (App. H, *infra*), particularly since the compensation here involved covers only a past period. Furthermore, we fail to see how the new, expanded inquiry ordered by the court of appeals has any relationship to the threshold legal issue of whether *any* compensation plan is lawful. The Commission has determined that *all* plans are unlawful on their face; it is this issue and this issue alone which is before the court of appeals, and speculation on how long the gas supply shortage is going to last will not aid in that determination.

Furthermore, if the court of appeals is correct, it would seem to follow logically that the "duration, shape and causation" of the shortage would permeate the gas allocation features of all curtailment plans as well as the ancillary compensation schemes that have accompanied some.[12] While we firmly believe that all such inquiries would be fruitless in the long run, the logical effect of the court of appeals' order would be to im-

[11] *E.g.*, how much new gas will be found, in what supply areas will it be found, and when? How much of that which will be found in its supply area will Transco acquire and when?

[12] We have pointed out above (p. 7, n.5) that the court of appeals has set for argument three other cases involving the legality of compensation plans. In addition, the court has decided the merits of the gas allocation feature of curtailment plans, including one involving Transco (*Philadelphia Gas Works* v. *FPC*, D.C. Cir. No. 76-1357, decided May 9, 1977). We cannot reconcile these actions with the one here at issue.

pede the Commission's ability to oversee curtailment practices and policies in the short run.

Finally, although the court's order is interlocutory, its effect is immediate and irreparable. Transco submits that, in terms of judicial interference, the latest order is even more grievous than the court of appeals' August 1, 1975 order which was summarily reversed by this Court. As this Court there determined, any review of the propriety of the order must be immediate to the meaningful. *FPC* v. *Transco,* 423 U.S. at 330, 331.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS F. RYAN, JR.
ROBERT G. HARDY
GALLAGHER, CONNOR AND BOLAND
821 Fifteenth Street, N.W.
Washington, D.C. 20005

Counsel for Petitioner

Of Counsel:

BRIAN E. O'NEILL, *Senior Vice President and General Counsel*

WILLIAM N. BONNER, JR.
Transcontinental Gas Pipe Line Corporation
Post Office Box 1396
Houston, Texas 77001

June 1977.

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2036

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.,
PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PIEDMONT NATURAL GAS CO., INC.
FARMERS CHEMICAL ASSOC., INC.
GAS SECTION
GEORGIA MUNICIPAL ASSO.
MANUFACTURES INSTITUTE, INC.
STAUFFER CHEMICAL CO.
OWENS-CORNING FIBERGLAS CORP.
PUBLIC SERVICE CO. OF NORTH CAROLINA
THE BROOKLYN UNION GAS CO.
LONG ISLAND LIGHTING CO.
CONSOLIDATED EDISON CO. OF NEW YORK, INC.
PHILADELPHIA GAS WORKS
ALUMINUM CO. OF AMERICA
SOUTH JERSEY GAS CO.
ATLANTA GAS LIGHT CO.
PUBLIC SERVICE ELECTRIC AND GAS CO.
INTERVENORS

No. 75-1038

PIEDMONT NATURAL GAS COMPANY, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

GENERAL MOTORS CORP.
AMERICAN TEXTILE MANUFACTURES INSTITUTE INC.
TRANSCONTINENTAL GAS PIPE LINE CORP.
OWENS-CORNING FIBERGLAS CORP.
CONSOLIDATED EDISON CO. OF NEW YORK, INC.
SOUTH JERSEY GAS CO.
EASTERN SHORE NATURAL GAS CO.
PHILADELPHIA GAS WORKS
BROOKLYN UNION GAS CO.
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.
PUBLIC SERVICE ELECTRIC & GAS CO.
ALUMINUM CO. OF AMERICA
PUBLIC SERVICE COMMISSION FOR THE
STATE OF NEW YORK
NORTH CAROLINA NATURAL GAS CO.
FARMERS CHEMICAL ASSO. INC.
LONG ISLAND LIGHTING CO.
INTERVENORS

No. 75-1045

ELIZABETHTOWN GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

GENERAL MOTORS CORP.
PIEDMONT NATURAL GAS CO. INC.
THE AMERICAN TEXTILE MANUFACTURING INSTITUTE INC.
TRANSCONTINENTAL GAS PIPE LINE CORP.
OWENS-CORNING FIBERGLAS CORP.
CONSOLIDATED EDISON CO. OF NEW YORK, INC.
SOUTH JERSEY GAS CO.
PHILADELPHIA GAS WORKS
PUBLIC SERVICE ELECTRIC AND GAS CO.
PUBLIC SERVICE COMPANY OF NORTH CAROLINA INC.
EASTERN SHORE GAS CO.
BROOKLYN UNION GAS CO.
FARMERS CHEMICAL ASSO. INC.
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
ALUMINUM CO. OF AMERICA
NORTH CAROLINA GAS CORP.
LONG ISLAND LIGHTING CO.
INTERVENORS

No. 75-1077

CONSOLIDATED GAS SUPPLY CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

TRANSCONTINENTAL GAS PIPE LINE
PIEDMONT NATURAL GAS CO.
AMERICAN TEXTILE MANUFACTURES INSTITUTE
OWENS-CORNING FIBERGLAS
SOUTH JERSEY GAS CO.
CONSOLIDATED EDISON CO. OF NEW YORK
GENERAL MOTORS CORP.
PHILADELPHIA GAS WORKS
PUBLIC SERVICE ELECTRIC & GAS CO.
PUBLIC SERVICE CO. OF NORTH CAROLINA
EASTERN SHORE NATURAL GAS CO.
THE BROOKLYN UNION GAS CO.
FARMERS CHEMICAL ASSO., INC.
NORTH CAROLINA NATURAL GAS CORP.
THE PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
ALUMINUM CO. OF AMERICA
LONG ISLAND LIGHT CO.
INTERVENORS

No. 75-1099

ATLANTA GAS LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

AMERICAN TEXTILE MANUFACTURERS INSTITUTE INC.
TRANSCONTINENTAL GAS PIPE LINE CORP.
GENERAL MOTORS CORP.
OWENS-CORNING FIBERGLAS CORP.
FARMERS CHEMICAL ASSO. INC.

NORTH CAROLINA NATURAL GAS CORP.
THE PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
ALUMINUM CO. OF AMERICA
PIEDMONT NATURAL GAS CO. INC.
BROOKLYN UNION GAS CO.
PUBLIC SERVICE CO. OF NORTH CAROLINA INC.
PUBLIC SERVICE ELECTRIC & GAS CO.
INTERVENORS

No. 75-1103

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

AMERICAN TEXTILE MANUFACTURERS INSTITUTE INC.
TRANSCONTINENTAL GAS PIPE LINE CORP.
GENERAL MOTORS CORP.
OWENS-CORNING FIBERGLAS CORP.
FARMERS CHEMICAL ASSO., INC.
NORTH CAROLINA NATURAL GAS CORP.
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK
ALUMINUM CO. OF AMERICA
PIEDMONT NATURAL GAS CO., INC.
LONG ISLAND LIGHTING CO.
PHILADELPHIA GAS WORKS
BROOKLYN UNION GAS CO.
PUBLIC SERVICE CO. OF NORTH CAROLINA INC.
PUBLIC SERVICE ELECTRIC & GAS CO.
EASTERN SHORE NATURAL GAS CO.
SOUTH JERSEY GAS CO.
INTERVENORS

No. 75-1200

STATE OF NORTH CAROLINA AND NORTH CAROLINA UTILITIES COMMISSION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PIEDMONT NATURAL GAS COMPANY, INC.
FARMERS CHEMICAL ASSOC. CO.
EASTERN SHORE NATURAL GAS CO.
PHILADELPHIA GAS WORKS
SOUTH JERSEY GAS CO.
GENERAL MOTORS CORP.
NORTH CAROLINA NATURAL GAS CORP.
PUBLIC SERVICE ELECTRIC AND GAS CORP.
CAROLINA PIPELINE COMPANY
THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.
OWENS-CORNING FIBERGLAS CORP.

On Proceedings Subsequent to Remand

Filed November 29, 1976

Before: BAZELON, *Chief Judge*, EDWARDS,* *United States Circuit Judge* for the Sixth Circuit; and MACKINNON, *Circuit Judge*

Opinion for the Court filed by *Chief Judge* BAZELON.

Dissenting Opinion filed by *Circuit Judge* MACKINNON.

---

* Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

BAZELON, *Chief Judge*: At issue in this case is an interim curtailment plan negotiated by the Transcontinental Gas Pipe Line Corporation (Transco) and its customers, in response to the natural gas shortage said to exist on the Transco pipe line. The plan is designed to allocate this gas shortfall among Transco's distributor customers. One element of the proposed plan is a compensation scheme, whereby those Transco customers curtailed less than the system-wide average would compensate those curtailed more than the average. The Federal Power Commission found the compensation scheme violative of the Natural Gas Act, and therefore rejected the proposed interim plan. This appeal followed.

On August 1, 1975, this court withheld consideration of this case, "until the Commission has completed its own investigation and report to this court of Transco's claims of reduced reserves. . . ." On January 19, 1976, the Supreme Court granted certiorari, vacated this court's order, and remanded with instructions that we should:

> either . . . proceed to the merits of the issues presented by the compensation scheme and only thereafter deal with the adequacy of the record in regard to the evidence of shortage, or immediately remand the case to the Commission for the required inquiry.

44 U.S.L.W. 3413; 96 S.Ct. — (1976). On February 6, 1976, we followed the latter course and remanded to the Commission [1]:

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[1] Notwithstanding our local Rule 13(d) governing remands "of the record" and "of the case" or the specific Supreme Court language we quoted in our February 6 order, and in light of the Supreme Court's purpose here of remand for supplementation of the record, we do not read our prior order as surrendering jurisdiction. Upon the Commission's motion to lodge its order of June 25, 1976 and attached documents, the court determines to treat the motion as a motion to file and to supplement the record in a case over which it has on-going jurisdiction, and as such grants it.

> [W]ell aware that the Commission has disapproved this compensation scheme rather than approved it, we do not see how we can fairly weigh the legality of that decision unless the record contains a basis for our deciding whether or not the agreement was a truly voluntary response to an actual shortage. No such basis is provided absent the Commission's investigation of the shortage question and findings of fact on this issue which can be properly reviewed by this court.

Memorandum accompanying Order of February 6, 1976, at 4-5.

Because we find that the information provided by the Commission on return of remand is still inadequate we must, reluctantly, remand the record once again.

I. Deficiencies on Prior Remand

On remand, in an attempt to expand the record to establish proof of an actual gas shortage, the parties entered into a stipulation of "facts [which] demonstrate that Transco has had, and continues to have, a necessity to curtail service to its customers. . . ." Among the recitations was that, "The annual volume of natural gas available from Transco's producer-suppliers has been declining since 1971 and has been and continues to be, insufficient to enable Transco to satisfy the certificated requirements of its customers. . . ." In support of the accuracy of this statement, the stipulation summarizes the affidavit of FPC staff witness, Wayne M. Thompson, a geologist in the Gas Supply and Production Section of the Bureau of Natural Gas. Thompson testified that staff initially undertook a review of the delivery capability of 18 fields connected to the Transco pipeline system and responsible for 12% of its supply. Thompson concluded that "Transco's projections of deliverability are reasonably accurate, although somewhat lower than our own." Affidavit at 2. He further concluded that "if

the fields studied are representative of the entire Transco supply," then "curtailment on Transco's system will be necessary, roughly to the extent Transco itself has stated." The stipulation also recites that Thompson "stated that a further staff review of 19 additional fields accounting for approximately 9% of Transco's gas supply did not change his opinion. . . ." Stip. at 2.

The Administrative Law Judge certified the stipulation to the Commission, along with relevant record evidence. On June 25, 1976, the Commission issued an eight-page order with these underlying materials as attachments. The principal Commission finding states,

> Upon consideration of the mandate of the remand by the Court of Appeals and the record evidence properly before the Commission we find that a natural gas supply shortage has in the past and continues to exist on Transco's system which has necessitated some curtailment of service to Transco's customers.

Order of June 25, 1976, at 8.[2]

We find that the record here, even as supplemented on remand, lacks the " 'substantial evidence' . . . necessary to support any such finding [of shortage] by the Commission." 44 U.S.L.W. at 3414; 96 S.Ct. — (1976).

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[2] This finding negates the dissenter's view that "If Transco has curtailed its customers in the past, or does so in the future, because of any shortage which is fictitious or self-induced, or in any way wrongful, it can be sued for damages." Dissent at 4. We note that a recent FPC news release indicates that in the gas year just ended (April 1975-March 1976), Transco was curtailing 35% of firm requirements systemwide. FPC Report of June 18, 1976 on 1976-77 Projected Natural Gas Pipeline Curtailments, Schedule I of Bureau of Natural Gas Staff Report. For the current gas year (April 1976-March 1977), Transco projects a deficiency of 42.98% of firm requirements. *Id.* Plainly the question of whether a shortage is "fictitious," "self-induced," or "in any way wrongful" is not simply a related or future question, but goes to the heart of the propriety of compensation.

This court has previously suggested that the existence and legitimacy of shortage on the Transco system could best be proven by thorough examination of the pipeline's proved reserves. But the Commission order on remand, while finding that a natural gas supply shortage has existed and continues to exist, does so exclusively in terms of "deliverability." The Commission states that "deliverability (the amount of gas capable of delivery in a fixed time period) evidence is more relevant to the issue of need for curtailment than is evidence on total proved reserves." Order, *supra*, at 7. Deliverability may, indeed, be "more relevant" to the question of whether curtailment is required on any given day; however, it seems clear that at least some explanation of the relationship between Transco's present deliverability crisis and its proved reserves, and the reasons for Transco's alleged inability to bring sufficient gas onstream, is required in order for the Commission and a reviewing court to be able to assess the nature, extent, and duration of shortage.

Diminished deliverability does not necessarily constitute substantial evidence of actual and legitimate long-term shortage if, for example, a pipeline or producer could, by more or less simple acts, make its proved reserves more deliverable. Similarly, diminished proved reserves may not support a finding of long-run shortage if by physically and economically achievable acts lying entirely within the control of a pipeline or producer, sizeable reservoirs of gas might be moved from the 'possible' or 'probable' categories into the category of 'proved reserves'.[3]

In a related context, the Commission has noted that the need for curtailment may arise in two legally distinct situations. In the first, reduction of service comes

[3] Gas which could be so moved into "proved reserves" will be termed "provable" throughout this opinion.

about because of government-ordered curtailment "necessary as a result of the [legitimate] gas shortage." In the second, "the pipeline's need to curtail resulted from its own negligence, bad faith, or other wrongful conduct." *See United Gas Pipeline Co.*, 49 F.P.C. 1211, 1220 (1973). We fail to see how the Commission can distinguish between these two shortfall conditions employing deliverability data alone.

However, even assuming that the deliverability data now in the record constituted proof of Transco's immediate shortage sufficient to justify curtailment of some sort, a determination of the legality of *compensation* would require a broader base of information.

II. Scope of the Present Remand of Record

Because of ambiguities in the Commission orders of November 12, 1974, and January 10, 1975, we are unable to determine whether the Commission concluded that *all* like compensation plans employed in the context of end-use curtailment would be barred by the Act, or whether instead it concluded only that this particular plan is improper.[4] But whether the opinions are intended to be read broadly or narrowly, we believe it is clear that any proposed compensation plan cannot be measured against

[4] There would appear to be serious questions about the validity of a broad ban on *all* compensation plans. *See* Mississippi Public Service Commission v. FPC, 522 F.2d 1345 (5th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3220. In that case the Fifth Circuit set aside an FPC order denying extraordinary relief from a curtailment plan. The relief sought consisted of a compensation plan, and the Commission denied the relief because it concluded that it lacked jurisdiction to order or approve any plan of compensation. The court disagreed, holding that "the imposition of compensation payments as a condition for the receipt of higher priority gas is within the statutory power of the FPC . . . ." *Id.* at 1350.

the strictures of § 4 of the Act [5] without substantial in-

[5] The overarching requirement of the Natural Gas Act is that all rates and charges by natural gas companies subject to FPC jurisdiction, and all governing rules and regulations, must be "just and reasonable," and those that are not are deemed unlawful. § 4(a). Under the compensation plan at issue in the instant case, the pipeline's distributor customers would pay differing prices for gas depending upon whether they were being curtailed more or less than the systemwide average. A threshold determination, therefore, would be whether the financial burdens and benefits related to compensation constitute "rates" or "charges" within the reach of § 4(a) for regulatory purposes.

Although we need not now reach this issue, we note that the Fifth Circuit has determined that such payments do *not* constitute "rates": "[C]ompensation payments are not 'rates' but in the nature of surcharges imposed in the context of a curtailment plan to insure that the burdens of curtailment are spread evenly and equitably among those affected. . . ." *Mississippi Public Service Commission, supra,* at 1350. The court suggested that "compensation plans are more analogous to the penalty payments included by the Commission in various curtailment plans to deal with the problem of overtakes." *Id.* "Surcharges" and "penalty payments," however, suggest limited application of a pricing mechanism for a short duration to achieve a clearly defined purpose; higher prices for gas sold as emergency relief or improperly taken in excess of curtailment, may not necessarily be analogous to varying permanent prices for gas allocated by the curtailment plan itself.

Assuming that compensation payments were found to be regulable "rates" or "charges," they would have to meet the non-discrimination requirements of § 4(b) of the Act, as well as the "just and reasonable" test of § 4(a). Section 4(b) provides:

> (b) No natural gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges,

formation regarding the duration, shape and causation of the alleged shortage on the Transco system. Such information is simply not provided by deliverability data alone. We believe that the legality of compensation may well turn, at least in part, on answers to the following sorts of questions: Are sufficient volumes of gas available as proved or provable reserves so that greater total deliverability can be foreseen in the short-term future? Are present levels of curtailment likely to continue for the indefinite future, or to deepen? And more specifically: will compensation be a short-term financial adjustment between customers of the pipeline to keep some of those customers financially afloat until the supply situation stabilizes, or will it be a permanent cross-subsidization? We believe that without such information, neither the Commission nor the court can hope to give meaning to statutory terms such as "rates," "charges," and "classes of service" in a regulatory landscape vastly altered by end-use curtailment.

> service, facilities, or in any other respect as between localities or classes of service.

15 U.S.C. § 717c. Determining whether compensation fees (if held to be regulable "rates" or "charges") constitute undue preference or disadvantage, or involve unreasonable differences as between localities or classes of service would be difficult. It is unclear, in the context of deep end-use curtailment, what the statutory phrase "classes of service" has come to mean. For example, when two distributor customers of a pipeline have vastly different consumer loads, one with mostly high priority volumes and transacting near-normal business, the other selling almost no gas because its mostly low priority volumes have been fully curtailed, are they similarly situated from the perspective of § 4(b)(2) simply because the underlying contractual terms of sale from the regulated pipeline are identical? Upon decision of this question may turn the lawfulness of differing gas prices charged those distributor customers under compensation.

III. Conclusion

In remanding the case to this court, the Supreme Court noted, ". . . it is at least conceivable that the Court of Appeals could determine that the lawfulness of the proposed compensation scheme is partially a function of the actual severity of the shortage." 44 U.S.L.W. 3413; 96 S.Ct. —— (1976). This court has so determined, as we suggested in our order of February 6, 1976. The additional information we now require in this second remand of the record is necessary to determine how Transco is marshaling its resources and proved and provable reserves to produce maximum deliverability in the future. Only when the anticipated duration and shape of the shortage is in better perspective will this court be able to assess the legality of the compensation scheme at issue here. The Clerk is instructed to remand the record herein to the Federal Power Commission for supplementation in accordance with this opinion.

So ordered.

MacKinnon, *Circuit Judge*, dissenting: The foregoing opinion finds it necessary to again remand this case (rather the record) to the Federal Power Commission. The stated objective of such a remand is

> to determine how Transco is marshaling its resources and proved and *provable* [1] reserves to produce maximum deliverability in the future. *Only when* the anticipated duration and shape is in better perspective will this court be able to assess the legality of the compensation scheme at issue here.

Maj. op. p. 9 (emphasis added).

In my view the foregoing misconceives the issues here and this court's ability to deal with them.

This court has before it a curtailment plan involving a compensation scheme. If the compensation scheme is invalid the entire curtailment plan falls and it would be unnecessary to consider any of the facts and issues that the remand directs the Commission to determine and consider. However, the majority, apparently obsessed with the idea that there is no actual gas or oil shortage,[1]

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[1] Originally the majority were concerned with "proved reserves" (Majority op. p. 10), which term has a precise meaning in the accepted geological and engineering concepts and methods used throughout the oil and gas industry, *i.e.*:

> [P]roved reserves [are] the current estimated quantity of natural gas and natural gas liquids which analysis of geologic and engineering data demonstrate with reasonable certainty to be recoverable in the future from known oil and gas reservoirs under existing economic and operating conditions. Reservoirs are considered proved that have demonstrated the ability to produce by either actual production or conclusive formation test.
>
> The area of a reservoir considered proved is that portion delineated by drilling and defined by gas-oil, gas-water contacts or limited by the structural deformation or lenticularity of the reservoir. In the absence of fluid

> contacts, the lowest known structural occurrency of hydrocarbons controls the proved limits of the reservoir. The proved area of a reservoir may also include the adjoining portions not delineated by drilling but which can be evaluated as economically productive on the basis of geological and engineering data available at the time the estimate is made. Therefore, the reserves reported . . . should include total proved reserves which may be in either the drilled or undrilled portions of the field or reservoir.

28 AMERICAN GAS ASSN., RESERVES OF CRUDE OIL, NATURAL GAS LIQUIDS, AND NATURAL GAS 102 (1974).

> [P]roved reserves . . . include gas and natural gas reserves of all types regardless of size, availability of market, ultimate disposition or use.

Id. at 96-97. The majority now expand their prior remand to include so-called "*provable* reserves"—not just proved reserves. The industry reports (*id.*) do not refer to any such classification. So unless some industry support can be cited for the term "provable reserves," it must be concluded that the majority have coined an *ad hoc* definition and gratuitously endowed it with their own non-scientific trappings. They define it to mean sizeable reservoirs of gas which might be moved from the "possible" or "probable" categories (both undefined) into the category of "proved reserves" by "physically and economically achievable acts lying wholly within the control of a pipeline or producer." Majority op. p. 10 & n.3. The term "proved reserves" already includes considerable quantities of natural gas that are not *absolutely* proved and which may be said to involve some degree of "possibility" or "probability"—such as reserves in the "undrilled portions of the field or reservoir." AMERICAN GAS ASSN., *supra* at 102.

How much more "possible" or "probable" the majority want the Commission to go in their now expanded effort to find some additional basis for supporting the remand, they do not say. Whether this attempt by the majority to now expand the inquiry into this nebulous area is practical remains to be seen. At the present time no industry or scientific support has been cited to justify it. If the Commission or the parties considered this request to be impractical, they can move for its modification.

have taken the bit in their teeth and *sua sponte* determined to compel the Commission to make an extensive and complex investigation, study and report on that issue. This same effort is being substantially duplicated for other gas producing areas by Congress, *Ashland Oil, Inc. v. FTC*, —— U.S.App.D.C. ——, —— F.2d —— (Nos. 76-1174 & 76-1304, Sept. 20, 1976), and other agencies, *FTC v. Texaco, Inc.*, 170 U.S.App.D.C. 323, 517 F.2d 137 (1975), *vacated pending rehearing en banc* (Feb. 6, 1976).

In determining that it has the *right* to do this, the majority hangs on the strict language of the sentence in the Supreme Court remand order which, *inter alia*, states:

> [I]t is at least *conceivable* . . . that the *lawfulness* of the proposed compensation scheme is *partially* a function of the actual severity of the shortage.

FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 334 (1976) (emphasis added).

However, to my mind, the reliance of the majority does not fully consider the import of the Supreme Court order. First, to the extent that the Supreme Court supported the theory of the majority it did so by saying it was *only* "conceivable." That is not much support. Second, the Supreme Court recognized that the validity of the compensation scheme was, at best, dependent only "*partially* [on] . . . the actual severity of the shortage." *Id.* This recognizes that this court could pass on that part of the plan that involved the validity of any computation scheme *inter sese* without the necessity of determining the existence or non-existence or exact extent of a gas shortage on the line. In fact, the two alternatives which the Supreme Court gave this court on remand [2]

[2] [T]he court below is free on remand either to proceed to the merits on the issues presented by the compensation scheme and only thereafter deal with the adequacy of the

are another recognition that it was not necessary to pass on the validity or extent of the gas shortage in order to rule that the plan was invalid because the Natural Gas Act does not permit the incorporation of any compensation scheme. Third, when the Supreme Court referred to the "*lawfulness* of the proposed compensation scheme" (emphasis added) as being only "*partially* a function of the actual severity of the shortage" (emphasis added), it indicated to me that it recognized that (1) the Commission might find the scheme to be lawful under the Natural Gas Act, but that (2) in its *application* to curtailed users, the same plan might at some later date be determined to involve an unlawful breach of their contracts because of Transco's "negligence, bad faith, or other wrongful conduct." This conduct might then also be found to violate the Natural Gas Act even though the Commission had previously approved the plan.

In my view of the present proceedings, none of the parties has raised any issue as to the lawfulness of the *application* of the plan to particular parties or in particular circumstances. Transco started back over 5 years ago on May 17, 1971, responding to the Commission's Order No. 431 to file *proposed* permanent curtailment plans for use in such future shortages as might arise. The presently proposed curtailment plan is a continuation of that original start as modified by subsequent alterations and such orders of the Commission and of this court as have compelled it to alter its plans. Also, the parties eventually negotiated a settlement among themselves involving the presently questioned compensation scheme.

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record in regard to the evidence of shortage, or immediately to remand the case to the Commission for the required inquiry.

423 U.S. at 334, *quoted in* majority op. p. 7.

The principal concern of the parties and the Commission with the plan is the validity of *any* compensation scheme in a curtailment plan in which priorities are based wholly or in part on end use criteria. And the inherent validity of such a compensation scheme is not dependent upon the existence of any particular degree of shortage, real or spurious. The plan is to be applied over a wide range of possible degrees of shortages. If Transco has curtailed its customers in the past, or does so in the future, because of any shortage which is fictitious or self-induced, or in any way wrongful, it can be sued for damages. Alternatively, parties aggrieved could conceivably petition the Commission for relief. But that is not this case and such issues have not been raised and cannot be decided on this record. We are restricted to acting on the basis of the record before us. However material the *bona fides* of a particular gas shortage might be to litigation involving the *application* of a curtailment plan to particular parties in particular circumstances, it is not "absolutely essential to a decision by [this court] on the issues presently before [this] court for review," *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 334 (1976), *i.e.*, to the validity of a monetary compensation scheme in a curtailment plan *based on end use criteria.* The question as to the *bona fides* of the shortage, and possibly the *bona fide* character of various degrees of shortages, that the majority *now* seek to interject into the proceeding for a Commission determination should be left to a more appropriate time and proceeding. So far as the parties are concerned, they have not raised any of these issues in this proceeding, and the determination of proved and *provable* reserves which the majority order by the present remand is premature and might never be required if this court passed on the issue involving the facial validity of the compensation scheme.

As previously indicated, the compensation scheme which was negotiated with Transco's customers would be invalid if Transco fraudulently misrepresented the existence or extent of a gas shortage, and the customers relied thereon in agreeing to the scheme and thereby suffered damage. But the more immediate question, and the one raised in this proceeding by those priority customers of Transco who would be required to pay compensation to lower priority customers, is whether the compensation scheme, *per se*, creates an "unreasonable difference in rates, charges, service . . . or in any other respect . . . as between classes of service." 15 U.S.C. § 717c(b) (1970). The Commission determined that the scheme was a *facial violation* of the Act. That issue can easily be ruled on by this court, right now, without any further delay and inconvenience to the parties and to the Commission and without the necessity of determining the amount of proved reserves, provable reserves, reserves economically achievable by acts lying wholly within the control of a pipeline or producer, etc. In my opinion we should rule on the merits of the facial validity of the compensation scheme *before* the Commission is forced to make the exceptionally complex findings and prophecies [3] that the majority orders, because if we find

[3] The majority assert:

> We believe that the legality of compensation may well turn, at least in part, on answers to the following sorts of questions: Are sufficient volumes of gas available as proved or *provable* reserves so that greater total deliverability can be foreseen in the short-term future? Are present levels of curtailment likely to continue for the indefinite future, or to deepen? And more specifically: will compensation be a short-term financial adjustment between customers of the pipeline to keep some of those customers financially afloat until the supply situation stabilizes, or will it be a permanent cross-subsidization? We believe that without such information, neither the Commission nor the court can hope to give meaning

the scheme to be facially invalid there is *no necessity* for the additional investigation. Certainly such procedure would work an economy of the time of this court and all parties concerned. A finding that the compensation scheme of the plan violated the Act would doom the entire plan for unlawfulness and no second reason for reaching the same conclusion would be necessary.

The majority assert that answering some of the questions "would be difficult" and that the meaning of the phrase "classes of service" is unclear.[4] Apparently the majority has some initial difficulty with whether the compensation called for by the compensation scheme is subject to regulation by the Commission. On the latter point the majority cites a Fifth Circuit case as holding that compensation payments do not constitute "rates," *i.e.*, "[C]ompensation payments are not 'rates' but in the nature of *surcharges* . . . ." [5] (Emphasis added.) Well, the statute says "rates" *and* "charges" and certainly the majority would not have any great difficulty in holding that a "surcharge" is a "charge." And as to whether "*classes* of service" are involved, the cases on permissible classification run into the thousands.

It is thus clear that the majority are overcomplicating the case, unreasonably burdening the parties without any assurance that it is necessary to do so, and unreasonably delaying a decision on the facial validity of the com-

> to statutory terms such as "rates," "charges," and "classes of service" in a regulatory landscape vastly altered by end-use curtailment.

Majority op. p. 13 (emphasis added).

[4] Majority op. pp. 12-13 n.5.

[5] Mississippi Public Service Commission v. FPC, 522 F.2d 1345, 1350 (5th Cir. 1975), *petition for cert. filed*, 45 U.S.L.W. 3061 (U.S. May 19, 1976), *quoted in* majority op. p. 12 n.5.

pensation scheme. Nothing would be lost by this panel immediately coming to grips with that issue and deciding it. If we decided the scheme was invalid the further inquiry would be unnecessary. If we decided the scheme was facially valid then the majority could remand for such additional information as they desired. That is the sensible way to approach the situation.[6] In addition to the foregoing I do not find that the majority has fairly considered the record furnished by the Commission in response to the remand and I also object to the indefinite and imprecise nature of the second remand that the majority now orders.

I respectfully dissent.

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[6] It is argued that the FPC should not consider the compensation agreement without first determining that there is a legitimate shortage. To my mind that question should be explored and determined when it is raised by the parties—and certainly not when the Commission has found the scheme to be invalid *for other reasons* which made it unnecessary to determine the existence of a legitimate shortage.

I would pass on the case that was presented to us by the parties. In that respect I would apply the Supreme Court's finding that the majority "overstepped the bounds of its reviewing authority . . . [by not confining its review] to 'consideration of the decision of the agency . . . and of the evidence on which it was based.' *U.S. v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-715 (1963)." FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331 (1976).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
September Term, 1976

No. 74-2036

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

PIEDMONT NATURAL GAS CO., INC., ET AL, *Intervenors*

And Consolidated Case Nos. 75-1038, 75-1045, 75-1077, 75-1099, 75-1103 75-1200

BEFORE: BAZELON, *Chief Judge;* WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*

Order

(filed January 18, 1977)

Upon consideration of the suggestions for rehearing *en banc* filed by Consolidated Gas Supply Corporation, Consolidated Edison Company of New York, Inc., Elizabethtown Gas Company, Piedmont Natural Gas Company and Transcontinental Gas Pipe Line Corporation, respectively, petitioners for review herein, and by respondent Federal Power Commission, and a majority of the Judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc*, that the aforesaid suggestions for rehearing *en banc* are denied.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judge McGowan did not participate in the foregoing order.

Circuit Judges Tamm, MacKinnon, Robb and Wilkey would grant the suggestion for rehearing *en banc*.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

(Caption omitted in printing)

BEFORE: BAZELON, *Chief Judge;* EDWARDS*, *United States Circuit Judge for the Sixth Circuit;* MACKINNON, *Circuit Judge*

Order

Upon consideration of the petitions for rehearing filed by Consolidated Gas Supply Corporation, Elizabethtown Gas Company, and Piedmont Natural Gas Company, Inc., petitioners for review herein, and by respondent Federal Power Commission, and of the petition for rehearing lodged in the Clerk's Office by Intervenor Brooklyn Union Gas Company, and of the petitions for rehearing and/or suggestions for rehearing *en banc* lodged in the Clerk's Office by Consolidated Edison Company of New York, Inc. and by Transcontinental Gas Pipe Line Corporation, petitioners for review herein, it is

ORDERED, by the Court, that the Clerk is directed to file the petition for rehearing lodged by intervenor Brooklyn Union Gas Company and the petitions for rehearing and/or suggestions for rehearing *en banc* lodged by Consolidated Edison Company of New York, Inc. and Transcontinental Gas Pipe Line Corporation, respectively, petitioners for review, and to enter the same on the docket, and it is

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* Sitting by designation pursuant to 28 U.S.C. § 291(a). Circuit Judge MacKinnon would grant the instant petitions.

FURTHER ORDERED, by the Court, that all of the aforesaid petitions for rehearing are denied.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

APPENDIX D

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1974

[Filed August 1, 1975]

No. 74-2036

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PIEDMONT NATURAL GAS CO., INC., ET AL.,

INTERVENORS,

AND CONSOLIDATED CASES

Before: BAZELON, *Chief Judge*; MACKINNON, *Circuit Judge* and EDWARDS,[1] *United States Circuit Judge for the United States Court of Appeals for the Sixth Circuit.*

ORDER

On receipt and consideration of the briefs and record in the above-styled case; and upon consideration

[1] Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

of the replies of the parties to this court's order of May 28, 1975, and to the order to show cause of this court entered on June 17, 1975;

Noting the refusal of the Federal Power Commission to certify to figures supplied by Transcontinental Gas Pipe Line Corporation purporting to support its claim of necessity for a severe curtailment of supply with consequent economic and financial hardship to many thousands of industrial, commercial and house heating customers on the Eastern Seaboard;

Now, therefore, this court will hold in abeyance any decision upon the order of the Federal Power Commission concerning Transco's plan for allocating the allegedly scarce gas supply until the Commission has completed its own investigation and report to this court of Transco's claims of reduced reserves by immediate subpoena of Transco's books and records pertaining to all gas supplies in which it has any legal interest, whether by ownership, lease, contract or other means and by field investigation has determined the extent of the reduced reserves and the bona fides of Transco and its suppliers in meeting their past and future contract commitments;

And further, recognizing that time is of the essence, and for the reasons stated in the attached memorandum opinion, that said investigations and report to this court be made within 30 days from the effective date of this order.

Per Curiam.

HUGH E. KLINE, *Clerk.*

MEMORANDUM

It was in April of 1971 that the Federal Power Commission promulgated Order No. 431, 36 Fed. Reg. 7505, which required pipelines within FPC jurisdiction to indicate whether an inadequate supply of natural gas would require curtailment of deliveries to customers. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 623. In early cases, it was argued that FPC authority to accept curtailment plans arose from Section 7(b) of the Natural Gas Act, 15 U.S.C. §717f(b), the provision respecting abandonments in whole or part of facilities or service within FPC jurisdiction. That provision denies to a jurisdictional company the power to abandon such facility or service unless and until there is a finding by the Commission, that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." Decisions of the Supreme Court and this Court have held (without holding that Section 7(b) is inapplicable under all circumstances) that the curtailment power of the FPC is embraced within the Commission's transportation jurisdiction, as implemented by Section 4 of the Act. *Michigan Power Co.* v. *FPC*, 161 U.S. App. D.C. 221, 494 F. 2d 1140 (D.C. Cir. 1974); *FPC* v. *Louisiana Power & Light Co., supra.*

The substantive standard governing FPC evaluation of curtailment plans is found in §4 (b) of the Act:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. 15 U.S.C. §717c(b)

As indicated above, the FPC processes curtailment plans under §4, including subsection (b) quoted above and subsections (d) and (e).

In *Louisiana Power & Light*, the Supreme Court found a "pattern of temporary and chronic natural gas shortages throughout the Nation," and supplier inability "to meet all of its contract commitments during peak demand periods." 406 U.S. at 626. In part, the Supreme Court relied for its finding of shortage upon the FPC's own Staff Report No. 2, National Gas Supply and Demand 1971–1990 (1972). That case, which defined the breadth of FPC curtailment power, said, "In the present cause, the issue is whether the FPC, acting under the head of its transportation jurisdiction and its broad mandate under §16, may order pipelines facing shortages to develop and submit rational curtailment arrangements." After distinguishing *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), which held that a pipeline may not unilaterally alter its contractual arrangements, the Court stated, "we conclude therefore that the FPC has the jurisdiction asserted here and that the Natural Gas Act fully authorizes the method chosen by the FPC for its exercise."

The *Louisiana Power & Light* case upholds [*sic*] the proposition that the FPC may require curtailment plans of pipelines "facing shortages," and there can be no doubt that actual shortage both underlies the concept of curtailment and justifies its application.

In light of that proposition, we have before us five challenging facts. First, in this case, Transco reported the highest proven reserves of gas in its history in 1969, yet less than five years later was reporting a shortage as severe that it required curtailments of 43.22 percent in this coming winter heating season, and

53.13 percent next summer. Response of Petitioner Elizabethtown Gas Company To Court's Order to Show Cause at 2. Second, the FPC "does not necessarily endorse the accuracy of the data supplied by Tranco," [*sic*] has not confirmed the existence of the claimed shortage, and is not now proceeding to do so for the purpose of this case, despite the Commission's approval of previous curtailment plans.[1] Response of FPC to Order Of May 29, 1975 at 2. Third, the FPC has informed this Court that the House Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce "has referred certain matters to the Justice Department for possible criminal prosecution," possibly for perjury charges concerning the extent of natural gas reserves. Further, Subcommittee Chairman, John E. Moss, "has specifically requested the Commission and its staff to refrain from contacting Mitchell Energy and Development Corporation and Cities Service Oil Corporation pending the present series of Subcommittee hearings on June 26 * * * and pending * * * [the Commission's] coordination with the Justice Department." Letter From John E. Moss to Hon. John N. Nassikas, June 19, 1975. Fourth, Transco's response to our show cause order states, "Because of claims of confidentiality of certain data supplied by independent producers, some of the underlying information may not be available on a public basis without obtaining a release from the producers (not from Transco). However, such data is regularly shown to FPC staff members for their review and analysis."

[1] We note that the Commission, by Order Amending Prior Order and Broadening Scope of Investigation, issued July 1, 1975, has expanded their investigation in Docket No. PR 75-51 [*sic*, RP 75-51]. However, we do not believe that that proceeding meets the requirements of the instant litigation.

We think this comment tends to indicate reluctance on the part of Transco to disclose the extent of committed contractual entitlements which it holds, and from which it committed itself to supply Eastern Seaboard ultimate customers. Fifth, Chairman Moss has advised the FPC Chairman that it is his view that the instant order of this Court "is not only justified but essential." Letter of John E. Moss to Hon. John N. Nassikas, June 25, 1975.

In a pending case, *United States Steel* v. *FPC*, —— U.S. App. D.C. ——, 510 F. 2d 689 (D.C. Cir., No. 74-2117, January 10, 1975), we denied a motion to stay the Commission's denial of emergency relief, saying, "Only an agency sufficiently aware of the overall state of natural gas supply and demand could *possibly* handle requests for emergency relief *seriatim*, and yet avoid the circumstances where relief grants, each with a *de minimus* impact upon competing customers, cumulate in outright suffering for all." Clearly, that statement postulates that actual shortage, and the Commission's detailed knowledge thereof, underlies any curtailment and emergency relief therefrom. Further, we deferred to this detailed knowledge of the Commisison, "since all these pieces of data are required to decide each request for emergency relief, and since in the absence of detailed information our decision would have to be based upon speculation of the rankest sort, chaos would likely result." We believe now as then, and our order of January 10th was clear notice to the agency if notice it had not had before, that a solid base of data is absolutely essential for just determination of curtailments and relief therefrom.

Thus, requiring that the Commission undertake the investigation ordered today, and complete the same

within thirty days, is by no means so stark a command as that time limit viewed alone might suggest. Indeed, in light of the record in this case and the abundant notice given to the agency in the past, we would think the Commission highly remiss in its duties had it not begun that undertaking long before today's order. Certainly, a responsible administrator would have attempte [*sic*] to determine whether a shortage requiring curtailment presently exists, at least since attention was called to the matter by the people's representatives in Congress. To summarize, Order No. 431, respecting the filing of curtailment plans predicated upon actual shortage was promulgated more than four years ago. Order No. 467, setting forth general policy respecting curtailment based upon "end-use" and establishing categories with respect thereto, has been in force since January 8, 1973. Surely the Commission has long been on notice that substantial data are required to justify curtailment, which is, after all, the denial of an amount of gas otherwise contracted for. As we said in *Pacific Gas & Electric Co.* v. *FPC*, —— U.S. App. D.C. ——, 506 F. 2d 33, 35 (D.C. Cir. 1974); "The country appears to be experiencing a natural gas *shortage which necessitates* the curtailment of supplies to certain customers during peak demand periods." (emphasis added) (footnote omitted). The only rationale advanced in support of any curtailment plan is actual shortage of natural gas to the pipeline, and that fact remains to be established by the investigation today ordered.

MacKinnon, *Circuit Judge:* The curtailment plan we consider here is the result of a settlement among the parties based on an alleged shortage of natural gas. If the shortage is not as severe as we have been

led to believe, then the parties to the settlement may also have been misled, and may have reached their agreement based on misinformation. The fairness of the terms of the settlement is one factor in the Federal Power Commission's determination whether to approve the proposed curtailment plan, and thus necessarily a consideration in our review of the Commission's action. While the existence of an actual shortage is peripheral to our obligation to pass on the legality of the curtailment plan, it is not wholly irrelevant.

Nevertheless it is not our primary function in reviewing the instant plan to become involved in that complex factual inquiry. Since other bodies are investigating the extent of Transco's shortage, with more direct authority than ours, I would reach the merits of the curtailment plan we are asked to consider. It seems misdirected to me to imply neglect by the Commission when it has acted promptly to disapprove the proposed plan. Our failure to review the agency's decision and to pass on the merits of the challenged compensation feature will only delay our judgment on an aspect of Transco's curtailment plan to which all parties concerned seem dedicated.

Thus, while I am not opposed to verification of the existence and extent of the alleged shortage, I believe that it would be more in keeping with the jurisdiction conferred upon us by Congress with respect to this matter to affirm the action of the Commission on the instant order and direct the Commission to determine the existence and extent of the gas shortage prior to passing on any subsequent curtailment plan.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

(Caption omitted in printing)

BEFORE: BAZELON, *Chief Judge;* *EDWARDS, *United States Circuit Judge for the Sixth Circuit;* and MACKINNON, *Circuit Judge*

Order

(filed February 6, 1976)

On consideration of the *per curiam* opinion of the Supreme Court of the United States granting the petition for certiorari, vacating the order of this Court, and remanding the case to this Court for further proceedings consistent with the Supreme Court's opinion, it is

ORDERED by the Court that the above cases are remanded to the Federal Power Commission for further proceedings not inconsistent with the opinion of the Supreme Court of the United States and the attached decision by this Court.

Per Curiam

Circuit Judge McKinnon dissents for the reasons set forth in his attached statement.

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* Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

No. 74-2036—*Transcontinental Gas Pipeline Co.* v. *FPC*

PER CURIAM. On August 1, 1975, this court issued the following order in the above-styled case:

> On receipt and consideration of the briefs and record in the above-styled case; and upon consideration of the replies of the parties to this court's order of May 28, 1975, and to the order to show cause of this court entered on June 17, 1975;
>
> Noting the refusal of the Federal Power Commission to certify to figures supplied by Transcontinental Gas Pipe Line Corporation purporting to support its claim of necessity for a severe curtailment of supply with consequent economic and financial hardship to many thousands of industrial, commercial and house heating customers on the Eastern Seaboard;
>
> Now, therefore, this court will hold in abeyance any decision upon the order of the Federal Power Commission concerning Transco's plan for allocating the allegedly scarce gas supply until the Commission has completed its own investigation and report to this court of Transco's claims of reduced reserves by immediate subpoena of Transco's books and records pertaining to all gas supplies in which it has any legal interest, whether by ownership, lease, contract or other means and by field investigation has determined the extent of the reduced reserves and the bona fides of Transco and its suppliers in meeting their past and future contract commitments;
>
> And further, recognizing that time is of the essence, and for the reasons stated in the attached memorandum opinion, that said investigations and report to this Court be made within 30 days from the effective date of this order.

Thereafter the Commission petitioned The Supreme Court of the United States for a writ of certiorari. Subsequently on January 19, 1976, the Supreme Court handed down a *per curiam* opinion granting the petition for certiorari, vacating the order of this court, and remanding the case to this court for further proceedings consistent with the Supreme Court's opinion.

The Supreme Court held that this court's order, to the extent that it prescribed for the agency "the methods, procedures, and time dimension of the needed inquiry and order[ed] the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency[.]" invaded the administrative domain.

The Court also, however, held:

> *Second.* We agree with the Court of Appeals that the existence of actual shortage of gas supplies forms the factual predicate necessary to the Commission's assertion of authority under its transportation jurisdiction, § 1(b) of the Act, 15 U.S.C. 717b, to approve the curtailment of gas already contracted for. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). Certainly that Court would properly conclude that the Commission would have abused its discretion had it approved curtailment plans in the absence of evidence whereby it "could have reasonably believed" the shortage to exist, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), and that "substantial evidence" in the record is necessary to support any such finding by the Commission.

The Supreme Court also held:

> *Fourth.* We are unable to determine with certainty, from this vantage point and on the partial record now before us, whether the evidence regarding Trans-

co's actual shortage with which the instant order is concerned is absolutely essential to a decision by the Court of Appeals on the issues presently before that court for review. Although Judge MacKinnon in his separate statement was apparently of the view that the Court of Appeals could determine that the lawfulness of the proposed compensation scheme is partially a function of the actual severity of the shortage. Cf. *FPC* v. *Louisiana Power & Light Co., supra.* Accordingly, the Court below is free on remand either to proceed to the merits of the issues presented by the compensation scheme and only thereafter deal with the adequacy of the record in regard to the evidence of shortage, or immediately remand the case to the Commission for the required inquiry. It is apparent that under neither alternative need the Court of Appeals' ability fully and effectively to review the administrative process regarding the implementation of curtailment plans and their underlying factual premises be relinquished.

Obedient to the views expressed by the Supreme Court, including its suggestion that "swift and priority consideration of this case" be given, we have considered whether or not on the partial record before us "the evidence regarding Transco's actual shortage with which the instant order is concerned is absolutely essential to . . . decision" of the instant case. We conclude that it is, and hence this case is immediately remanded to the Commission for the required inquiry "in regard to the evidence of shortage."

We have noted with interest a case decided after the date of our preceding order and referred to in the Supreme Court's *per curiam* opinion without comment. *Mississippi Public Service Com'n* v. *F.P.C.*, 522 F.2d 1345 (5th Cir. 1975). In this case the Fifth Circuit held that contrary to the view expressed by the Federal Power

Commission, the Commission did have jurisdiction "to effectuate relief of the type sought in the petition for extraordinary relief." *Id.* at 1349. The relief sought in this Fifth Circuit case was a Federal Power Commission order to implement the same sort of proposal as is before us for high priority users who are scheduled to receive above average allotments of gas to compensate lower priority users who are allotted below average amounts of gas.

In our instant case, however, the Commission was presented with a negotiated agreement between higher priority users and lower priority users for the former to compensate the latter. This court has been urged by Transco and various of its distributing companies to find that the Commission's *disapproval* of this "voluntary agreement" is not supported by the record. We do not perceive how we could fairly consider "the lawfulness of the proposed compensation scheme" unless the Commission has first fulfilled its duty to determine whether a real shortage exists. Thus far the Commission has refused to certify the existence of the shortage claimed by Transco, and as far as our record shows, has not completed any investigation of its own.

While, of course, we are well aware that the Commission has disapproved this compensation scheme rather than approved it, we do not see how we can fairly weigh the legality of that decision unless the record contains a basis for our deciding whether or not the agreement was a truly voluntary response to an actual shortage. No such basis is provided absent the Commission's investigation of the shortage question and findings of fact on this issue which can be properly reviewed by this court.

For these reasons (to employ the words of the Supreme Court) we "immediately remand the case to the Commission for the required inquiry."

MacKinnon, *Circuit Judge*, dissenting: My views on this case were initially set forth in the memorandum accompanying the order of this court of August 1, 1975. We deal here with a *disapproval* by the Commission of a compensation scheme in a curtailment plan. If the Commission is affirmed by the court, then it is unnecessary to determine the existence or extent of a gas shortage because the compensation scheme is *invalid* on its face and it is not necessary to go further and determine the existence or extent of a gas shortage because such factual predicate is only necessary to a *valid* plan. It is true that if the record does not furnish the Commission with a basis for reasonably believing that a gas shortage exists or is imminent the Commission would not have authority to *approve* a curtailment plan but certainly the Commission can *disapprove* a compensation scheme in a curtailment plan submitted by the parties thereto when the scheme appears to be facially invalid and the existence of a shortage is not questioned by any party to the proceeding.

As to the substantive issue concerning the validity of the compensation scheme, it is my opinion that the Commission properly held the scheme to be an undue discrimination prohibited by section 4(b) of the Natural Gas Act.

Under *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), curtailment plans are to be weighed against section 4(b) of the Natural Gas Act. This section provides:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

15 U.S.C. § 717c(b). There is no question that the rates here are discriminatory; many natural gas rates are. The question is whether they are unduly discriminatory. Addressing this point, it is clear that under the settlement proposal Transco would charge different rates to similarly situated customers which rates were not the result of differences in Transco's cost of serving these customers. In actual operation, different rates would result from the varying degree to which each customer is curtailed and the degree of curtailment would be determined in part by the character of the use of the gas by the customer. Neither of these factors, degree of curtailment or nature of the use, is related to Transco's cost of service; but standing alone this is an insufficient ground upon which to base a finding of illegality. The issue is whether the "difference in . . . charges, service . . . or in any other respect," based as it is on the nonpipeline costs specified in the settlement curtailment plan, is reasonable under the circumstances here present.

Under the proposed compensation scheme contained in the settlement curtailment plan it is obvious that high priority customers will be charged more for their gas and lower priority customers will pay less. Thus, the compensation plan would penalize high priority users for the benefit of low priority users, and in so doing would operate inconsistent with the approved objective of the Commission to base curtailment on our use.[1] This inconsistency would result from the fact that the higher price required to be paid by high priority users would deter such

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[1] FPC v. Louisana Power & Light Co., 406 U.S. 621, 641-647 (1972): American Smelting & Refining Co. v. FPC, 161 U.S.App. D.C. 6, 17, 494 F.2d 925, 936, *cert. denied sub nom.* Southern California Gas Co. v. FPC, 419 U.S. 882 (1974).

priority customers from fully satisfying their needs and would thereby make the unused portion of their full entitlement to gas available for low priority users which in many instances is the more inefficient use. In any event it has been determined to be the lower *priority* use and favoring such low priority use, to the extent that the compensation scheme does, would frustrate and interfere with the operational scheme of the curtailment plan by interjecting factors that work against the principles upon which the plan is based. Upon such reasoning the Commission acted properly within its authority in rejecting the proposed compensation scheme.[2]

It is also significant that the record does not support any showing of compelling need to discriminate in favor of the low priority users who would benefit from the compensation scheme. The Commission noted:

> [T]he payments unrelated to costs, losses or hard data of any sort, are as certain to be hurtful to one group of consumers as they are to [be] helpful to another, without visible regard to the question of how much helpfulness is actually needed. (R. 11689)

It is accordingly my view that the settlement agreement was properly rejected because the compensation scheme constituted an undue discrimination in that it would maintain unreasonable difference in "charges, service, facilities [and] in other respect[s] . . . as between . . . classes of service" contra to section 4(b).[3] I would thus affirm the decision of the Commission. I see no necessity for getting into matters that are not necessary to determine the *invalidity* of the plan. Finding the plan invalid on one ground is sufficient. If it were to be

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[2] FPC v. Louisiana Power & Light Co., *supra*, note 1, 406 U.S. at 646-47.

[3] *Id.*

found invalid because of an insufficient shortage, the resulting invalidity would not be changed in any way. I thus see no necessity for a remand. I would rule on the principal issue.

I thus respectfully dissent from the finding in the foregoing opinion that "the evidence regarding Transco's actual shortage . . . is absolutely essential to . . . decision" of the instant case.

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman;
Don S. Smith, John H. Holloman III,
and James G. Watt.

Transcontinental Gas Pipe Line Corporation) Docket No. RP72-99
)

ORDER UPON REMAND BY THE COURT OF APPEALS

(Issued June 25, 1976)

Presently before the Commission is a remand by the United States Court of Appeals for the District of Columbia Circuit 1/ ordering the Commission to find whether or not a natural gas shortage exists on the interstate pipeline system of Transcontinental Gas Pipe Line Corporation (Transco). The Court of Appeals has stated that it must first have evidence of an actual gas shortage on Transco's system before it can rule upon the consolidated appeals before it concerning the validity of the Commission's prior orders rejecting a proposed compensation provision included in a proposed interim curtailment plan settlement previously filed by Transco. We find that a natural gas shortage does in fact exist on Transco's system which has necessitated some curtailment of service.

To better understand how the Commission has arrived at this conclusion it is first advisable to review the lengthy and intricate procedural history surrounding this curtailment proceeding.

(1) Pursuant to Order No. 431 2/, Transco on May 17, 1971, tendered for filing its first permanent curtailment plan which the Commission suspended for one day and set for hearing by order of May 27, 1971, in Docket No. RP71-118. Then by order of November 15, 1971 (46 FPC 1212) the Commission conditionally approved an interim settlement agreement filed by Transco on October 26, 1971, which

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1/ Transcontinental Gas Pipe Line Corporation, et al. v. FPC, No. 74-2036, et al., (D. C. Cir. February 6, 1976) per curiam.

2/ 45 FPC 570 (1971).

established a pro rata curtailment plan to be in effect from November 16, 1971, through November 15, 1972, and it accordingly terminated that docket.

(2) Thereafter on January 17, 1972, Transco tendered for filing its second proposed permanent curtailment plan which the Commission by order of February 16, 1972, again suspended and set for hearing in Docket No. RP72-99. Thereafter by order of November 15, 1972, (48 FPC 1060) the Commission approved a second interim settlement agreement, this time filed by Transco on September 12, 1972. This settlement provided an interim pro rata curtailment plan to be in effect from November 16, 1972, through November 15, 1973.

(3) Notwithstanding the fact that the second interim settlement agreement bound Transco to file a new curtailment plan, Transco filed on May 1, 1973, a motion requesting a one-year extension of this second interim curtailment plan; however, by order of May 23, 1973, (49 FPC 1141) the Commission denied this motion and moreover directed Transco to file a new curtailment plan by July 1, 1973, noting in passing that Transco should consider the curtailment priorities and procedures outlined in Order No. 467-B. 3/ In response thereto Transco on June 29, 1973, tendered for filing a new curtailment plan embodying Order No. 467-B priorities, but on July 6, 1973, it nevertheless renewed its motion for a one-year extension of its second interim curtailment plan. By order of July 30, 1973, (50 FPC 281) the Commission denied this renewed motion, suspended the 467-B type plan until November 16, 1973, and set the matter for hearing. Rehearing of this order was denied on September 17, 1973 (50 FPC 803). Immediately thereafter on September 18, 1973, one of Transco's direct customers, Consolidated Edison Company of New York, petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the abovementioned May 23, July 30, and September 17 orders. It also moved for stay of the same orders, which the Court of Appeals granted on November 9, 1973. 4/ The Court of Appeals subsequently clarified this order 5/ by stating that, while the Commission should proceed with hearings on Transco's permanent plan, the second interim curtailment plan would continue in effect pending further

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3/ 49 FPC 583 (1973).

4/ Consolidated Edison Company of New York, Inc. v. FPC, No. 73-1999 (D. C. Cir. November 9, 1973).

5/ Consolidated Edison Company of New York, Inc. v. FPC, No. 73-1999 (D. C. Cir. December 14, 1973).

Court order. This appeal was ultimately denied by the Court of Appeals 6/, as will be discussed in greater detail subsequently.

The second interim curtailment plan, which was originally contemplated to operate only for the period from November 16, 1972, through November 15, 1973, in fact remained in effect beyond the end of that period and through most of 1974 as well due to the continued operation of the November 9, 1973, Court-imposed stay.

(4) Having received several complaints from Transco's customers that this pro rata plan endangered high priority service in light of an increased level of curtailment, the Commission on September 12, 1974, filed a motion with the Court of Appeals requesting permission to investigate these complaints and to take appropriate action for the 1974-75 winter season. On October 4, 1974, the Court of Appeals, however, ordered that the second interim plan remain in effect until the Commission could implement a permanent plan, except that Transco was free to file a new interim plan with the Commission.

Between the Commission motion and Court order Transco had in fact on September 30, 1974, tendered for filing a third interim settlement agreement to cover the period from November 16, 1974, through November 15, 1975. This proposed interim curtailment plan basically functioned 50% on a pro rata basis and 50% on an end-use 467-B type basis. It also contained a compensation provision by which the least curtailed customers would compensate the most curtailed customers. By order of November 12, 1974, the Commission rejected this third interim settlement agreement because of the compensation provision contained therein; however, the Commission also found that in light of the deepening gas crisis on Transco's system continuation of the pro rata second interim plan would not be in the public interest. It therefore noted that it was going to seek dissolution of November 9, 1973, stay of its orders putting Transco's 467-B related plan in effect.

Although on November 13, 1974, Transco did file this 467-B type interim plan, it thereafter appealed the November 12, 1974, order and after consolidated oral argument on November 21, 1974, the Court of Appeals on November 26, 1974, 7/ modified

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6/ Consolidated Edison Company of New York, Inc. v. FPC, 512 F.2d 1332 (D. C. Cir. 1975) (Con Ed II).

7/ Consolidated Edison Company of New York, Inc. v. FPC, 511 F.2d 373 (D. C. Cir. 1974), per curiam. (Con Ed I)

its earlier stay of November 9, 1973, by implementing Transco's third interim settlement agreement rejected by the Commission on November 12, 1974, having found that neither the earlier pro rata second interim settlement agreement nor the 467-B type plan is appropriate under current conditions. The Court of Appeals did, however, require that all compensation provision payments be placed in escrow. The Commission complied with the Con Ed I order in its order of January 10, 1975, on rehearing of the November 12, 1974, order. It also found that the record of the permanent proceeding should be reopened for purposes of environmental review.

In the previously noted Con Ed II decision of May 28, 1975, supra note 6, besides affirming the Commission orders of May 23, July 30, and September 17, 1973, the Court of Appeals moreover stated that "we release our grip on the interim curtailment arrangements," noting, that the stay which imposed Transco's third interim settlement agreement would continue until the Commission moved for its dissolution. By order of July 25, 1975, the Court of Appeals went further by stating that the Commission had the authority to approve and effectuate a curtailment plan without express Court permission.

Several petitions for review of the November 12, 1974, and January 10, 1975, Commission orders rejecting the compensation provision of Transco's third interim settlement agreement were filed with the Court of Appeals. It is this appeal which is presently before the Court of Appeals and for the resolution of which this order on remand is requested.

Following oral argument of this appeal the Court of Appeals on May 28, 1975, issued an order sua sponte requesting the parties to supply answers to a series of questions concerning Transco's proven reserves. 8/ This was followed on June 7, 1975, by an order to show cause why the Court should not require the Commission to complete within thirty days an investigation of Transco's claim of reduced reserves in light of the Commission's refusal to certify to curtailment figures it had received from Transco and had offered in answer to the Court's May 28, 1975, questions. 9/

8/ Transcontinental Gas Pipe Line Corporation, et al. v. F.P.C., No. 74-2036 (D.C. Cir. May 28, 1975), per curiam.

9/ Transcontinental Gas Pipe Line Corporation v. F.P.C., No. 74-2036(D.C. Cir. July 7, 1975), per curiam.

Thereafter on August 1, 1975, the Court of Appeals in fact did issue such an order holding resolution of the appeal in abeyance pending completion of the Commission's investigation of Transco's gas supply using subpoena and field investigation. 10/ The Court denied rehearing en banc of the order on August 28, 1975.

While the Commission commenced compliance with this Court order by ordering the Secretary to issue a subpoena duces tecum to Transco in the ongoing investigation into Transco's curtailment, Docket No. RP75-51, infra, it petitioned the Supreme Court in October 1975 for a writ of certiorari to the Court of Appeals August 1, 1975, order, supra note 10. By per curiam opinion the Supreme Court on January 19, 1976, granted the Commission's petition for certiorari, vacated the August 1, 1975, order, and remanded to the Court of Appeals either to proceed on the merits or to remand to the Commission for required inquiry into Transco's actual gas shortage. 11/ It is upon this remand that the Court of Appeals, upon concluding that evidence of Transco's actual gas shortage is essential, remanded the case to the Commission, supra note 1.

(5) By order of November 28, 1975, the Commission accepted and approved Transco's fourth interim settlement agreement, which it had introduced into evidence during the permanent plan hearings on October 15, 1975. The resulting interim curtailment plan, which is directed to protecting high end-use priority loads, is in effect from November 16, 1975, through October 31, 1976. In the meantime the proceeding to establish a permanent curtailment plan continues with Staff's environmental presentation the only unfinished segment of the hearing.

(6) A separate though related proceeding commenced when by order of January 8, 1975, the Commission instituted an investigation into the level of curtailment on Transco's system for the 1974 winter hearing season. Thereafter by order of July 1, 1975, the Commission expanded this investigation to determine the need for any curtailment at all by

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10/ Transcontinental Gas Pipe Line Corporation v. F.P.C., No. 74-2036 (D.C. Cir. August 1, 1975), per curiam.

11/ F.P.C. v. Transcontinental Gas Pipe Line Corporation, 44 U.S.L.W. 3413 (U.S., January 19, 1976), per curiam.

Transco in its deliveries to its resale customers. Then on August 8, 1975, as noted above, the Commission ordered the Secretary to issue a subpoena duces tecum to Transco pursuant to the August 1, 1975, order of the Court of Appeals. On the same date the Commission also ordered Transco's nineteen large producer-suppliers, which together furnish Transco with 80% of its gas supplies, pursuant to Section 10 of the Natural Gas Act to report certain preliminary information in furtherance of this Transco investigation.

Although hearings in Docket No. RP75-51 have not been completed at this time, the parties to that proceeding have entered into a stipulation and agreement in order to assist in our expeditious response to the Court of Appeals remand, supra note 1, and the Presiding Administrative Law Judge in RP75-51, Curtis L. Wagner, Jr., certified (APPENDIX A) this stipulation and agreement, along with related portions of the record to the Commission on May 26, 1976.

Against this historic backdrop we turn to the evidence before us and conclude that Transco has both suffered in the past from and continues to suffer from an actual gas supply shortage which has necessitated the curtailment of service to both direct and resale customers. In reaching this conclusion we turn first of all to the stipulation and agreement certified to us from the record (Tr. 3131-3132) of Docket No. RP75-51 (APPENDIX B). We note that this stipulation is expressly limited to the "question of Transco's necessity to curtail service to its customers." In considering this stipulation our inquiry is similarly limited, and this order is in no way intended to prejudice the other issues pending in RP75-51. We find particularly relevant and persuasive the following stipulated facts: (1) Ever since 1971 the total annual gas supply received from Transco from its producer-supplier has been declining and has been and continues to be insufficient to meet all of Transco's certificated requirements. (2) System-wide curtailment by Transco has been increasing as the flowing gas supply declines: 1971 - 3.9%; 1972 - 8.3%; 1973 - 13.1%; 1974 - 24.8%; 1975 - 33.7%; and 1976 (projected) - 41%. (3) Evidence introduced by Commission Staff (Exh. 74; Tr. 2582, 2583, 2621) indicates that, based upon review of a sample of the fields supplying gas to Transco, Transco's deliverability projections were reasonably accurate, and Transco needed to curtail service. Although we do not rely exclusively upon the agreement of the parties in Docket No. RP75-51 that "Transco has had, and continues to have, a necessity to curtail service to its customers" (Tr. 3131), the complete absence of any opposition to and the active support by almost all parties for the stipulation and agreement (Tr.3120 -3130) (APPENDIX C) do enhance the veracity and significance of this document.

Our review of the certified evidence in Docket No. RP75-51 (Exh. 74; Tr. 2582, 2583, 2621) (APPENDIX D) upon which the stipulation is predicated reinforces our finding of an actual natural gas shortage on Transco's system necessitating curtailment. Exhibit 74, which is an affidavit of Commission Staff witness Thompson, presents the results of Staff's deliverability study. Preliminarily we agree with witness Thompson (Exh. 74, p. 2) that deliverability (the amount of gas capable of delivery in a fixed time period) evidence is more relevant to the issue of need for curtailment than is evidence on total proved reserves. Moreover, while this Staff study did not include all of the many fields supplying Transco, Staff was justified in randomly selecting certain fields. 12/ After calculating the deliverability for these 18 fields for a 13 month test period Staff then compared its findings with Transco's deliverability projections and found that, while comparisons on individual fields varied to a greater degree, Staff's total deliverability figure for the 18 fields for the 13 month period (July 1975 through July 1976) was only 6.77% higher than Transco's related estimate. Staff witness Thompson concluded from these results that for these 18 fields Transco's deliverability estimates were reasonably accurate. In light of Staff witness Thompson's unimpeached expertise in gas supply matters, as well as the reliable methodology employed in Staff's study, we find that, not only were Transco's deliverability estimates reasonably accurate for the 18 fields considered, but it is also reasonable to project that Transco's estimates for the remainder of the 171 fields are sufficiently accurate for our present purposes.

Since Transco's deliverability estimates indicate its available gas supply over a fixed time period, which Transco in turn relies upon in projecting the volume and percent of curtailment (Exh. 74, p. 6), we are justified in concluding from Exhibit 74 that at least for the period from July 1975 through July 1976 Transco in fact has been experiencing a gas supply shortage which has necessitated curtailment generally to the extent projected.

12/ The corpus of Staff's raw data for this study was the tremendous quantity of gas supply documents delivered pursuant to the Commission's August 8, 1975, subpoena duces tecum, supra. Staff determined therefrom that Transco was purchasing gas from producers out of 171 fields containing 1700 reservoirs and 3000 wells. Since this study was made in response to the Court of Appeals order directing the Commission to investigate Transco's gas supply, supra note 10, Staff could not determine the deliverability for all 171 fields, and it acted reasonably in randomly selecting 18 fields which produced 11.9% of Transco's available gas supply.

The conclusions we have reached above upon analysis of Exhibit 74 are strengthened by the additional certified evidence (Tr. 2582, 2583, 2621) that a further deliverability study of another 19 fields did not alter Staff witness Thompson's conclusion.

Finally, we reference our November 28, 1975, order accepting Transco's fourth interim settlement agreement in which we found (Slip Op. at 7) that "Transco's supply situation has deteriorated within the last year . . . ," as well as finding "the existence of an emergency on Transco's system . . . ."

The Commission further finds:

Upon consideration of the mandate of the remand by the Court of Appeals and record evidence properly before the Commission we find that a natural gas supply shortage has in the past and continues to exist on Transco's system which has necessitated some curtailment of service to Transco's customers.

The Commission orders:

(A) We direct the Commission's Solicitor this day to file a motion to lodge this order and appended documents with the United States Court of Appeals for the District of Columbia Circuit.

(B) Upon the conclusion of the proceedings in Docket No. RP75-51 the Commission will issue whatever order is appropriate in light of the record evidence therein.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

APPENDIX G

The Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, provides in pertinent part:

Section 19(b):

Any party to a proceeding under this act aygrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commis-

sion and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254). [15 U.S.C. 717r(b)].

APPENDIX H

BEFORE THE
FEDERAL POWER COMMISSION
WASHINGTON, D.C. 20426

Docket No. RP75-51

In the Matter of

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Stipulation and Agreement

WHEREAS, the instant proceeding was instituted by the Commission's Order issued January 8, 1975, for the purposes of investigating the circumstances underlying the projections of Transcontinental Gas Pipe Line Corporation ("Transco") for increased curtailment on Transco's system during the 1974-1975 winter, and a determination as to the then-current projections of curtailment for Transco's system; and

WHEREAS, the scope of the aforesaid investigation was enlarged by Commission Order of July 1, 1975 to encompass, *inter alia*, "the extent of the alleged necessity for any curtailment on the system of Transco"; and

WHEREAS, in order to enable the Commission to comply with the February 6, 1976 order of the United States Court of Appeals for the District of Columbia Circuit in *Transcontinental Gas Pipe Line Corporation, et al.*, v. *F. P. C.*, Nos. 74-2036, *et al.*, issued in furtherance of the Supreme Court's January 19, 1976 order calling for "swift and priority consideration" of that proceeding, the parties agree that the Supreme Court's directive and the public interest would be served by prompt resolution of the threshhold question of Transco's necessity to curtail natural gas service to its customers; and,

WHEREAS, the parties agree that such questions should be severed and submitted on stipulation because it is unlikely that other matters involved in the instant investigation can promptly be resolved under present procedures;

NOW THEREFORE, the parties stipulate and agree, pursuant to Section 1.25 of the Commission's Rules of Practice and Procedure, that the following facts demonstrate that Transco has had, and continues to have, a necessity to curtail service to its customers:

1. The total annual volume of natural gas available from Transco's producer-suppliers has been declining since 1971 and has been, and continues to be, insufficient to enable Transco to satisfy the certificated requirements of its customers, and Transco instituted mandatory curtailment of its customers commencing in June, 1971. Such curtailment has been effectuated under a series of curtailment plans filed by Transco and approved by the Commission, or placed into effect pursuant to Court order;

2. System-wide curtailment percentages have steadily increased due to the continuing decline in flowing gas supplies, as follows: 1971 - 3.9%; 1972 - 8.3%; 1973 - 13.1%; 1974 - 24.8%; 1975 - 33.7%; and system average curtailment is projected to be 41% for 1976.

3. The Commission's staff initially undertook a review of the delivery capability of 18 fields connected to Transco's system accounting for approximately 12% of Transco's supply. On the basis of such review, Staff's witness, Mr. Wayne M. Thompson, expressed his opinion that the projections of deliverability made by Transco are "reasonably accurate" and that "curtailment of Transco's system will be necessary, roughly to the extent Transco itself has stated." (Ex. 74). Mr. Thompson also stated that a further review

of 19 additional fields accounting for approximately 9% of Transco's gas supply did not change his opinion stated above (Tr. 2582, 2583, 2621).

The foregoing Stipulation and Agreement is entered into for the purpose of resolving promptly the question of Transco's necessity to curtail service to its customers, pursuant to the directions on remand by the Court of Appeals in D.C. Cir. Nos. 74-2036, *et al., supra,* and is without prejudice to the positions which any party hereto may take with respect to any and all questions which have been raised or which may be raised in the instant proceeding, other than that stipulated to herein, i.e., Transco's need to curtail service to its customers.

The parties hereto agree that the foregoing Stipulation and Agreement and the record in this proceeding shall be certified to the Commission pursuant to Section 1.30(c) of the Commission's Rules of Practice and Procedure, and request that the Commission promptly enter its findings regarding Transco's need to curtail based upon this Stipulation and Agreement.

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2036
TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.,

No. 75-1038
PIEDMONT NATURAL GAS COMPANY, INC.,

No. 75-1045
ELIZABETHTOWN GAS COMPANY,

No. 75-1077
CONSOLIDATED GAS SUPPLY CORPORATION,

No. 75-1099
ATLANTA GAS LIGHT COMPANY,

No. 75-1103
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

No. 75-1200
STATE OF NORTH CAROLINA AND NORTH CAROLINA UTILITIES COMMISSION,

Petitioners,

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Rehearing and Suggestion for Rehearing *En Banc*
of
Transcontinental Gas Pipe Line Corporation

Comes now Transcontinental Gas Pipe Line Corporation (Transco) and, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, respectfully sub-

mits its petition for rehearing with respect to the opinion issued by this Court on November 29, 1976, in the above-captioned proceedings. Because the matter involved herein is of exceptional importance, Transco submits that rehearing *en banc* is appropriate. In support of this petition, Transco avers as follows:

I

Statement of the Case

This case arose originally because the Federal Power Commission ("FPC" or "Commission") refused, on the threshold of the 1974-75 winter, to approve a one-year interim settlement of the curtailment rules on the pipeline system of Transcontinental Gas Pipe Line Corporation ("Transco"). Because of the urgency caused by the Commission's action, which took place on November 12, 1974, only three days before Transco's then-effective rules were to expire, Transco and General Motors Corporation jointly appealed to this Court on November 18, 1974 and requested a "stay" of the Commission's action, i.e., that the Court order into effect the gas allocation method provided by the settlement. After argument held on November 21, 1974, on motions made in this case and in *Consolidated Edison Company of New York, Inc., et al.*, v. *FPC*, Nos. 73-1999, *et al.*, another panel of this Court on November 24, 1974 took the unprecedented step, because of "a shortage on the Transco system of what appears to be crisis proportions" of ordering the allocation procedures into effect commencing as of November 16, 1974. 511 F. 2d 372, 382. At the same time, at the suggestion of Transco and others, the Court provided for placing in escrow the funds relating to the issues of "compensation", the claimed illegality of which was the sole basis for rejection of the settlement by the FPC.[1]

[1] Pursuant to the order of this Court, approximately $19 million collected pursuant to the compensation provision has been placed in escrow pending disposition of the instant appeals.

Briefs were thereafter filed with respect to the sole remaining issue of the legality of "compensation",[2] and oral argument was held on May 21, 1975.

Commencing on May 28, 1975, there ensued a series of unusual actions which have culminated over a year and a half later with the Court's opinion of November 29, 1976, as to which rehearing is here sought. First, on May 28, 1975, the Court issued an order, *sua sponte*, in which it requested detailed information from "the parties" concerning the history of "proven reserves" on Transco's system. Transco responded to this request, furnishing data to the Court which had been filed over the years with the Commission *under oath* and indicating, *inter alia*, that Transco's proved reserves at the end of 1974 were slightly less than half what they were at the end of 1966, the point of greatest volume.[1] The response also indicated that "Transco would be pleased to provide any additional information desired by the Court for its evaluation of the need for prompt action," an indication that Transco was puzzled as to the basis for the Court's inquiry.

The FPC also responded (through its counsel, not by formal action as a Commission) to the Court's injuiry. Unfortunately, the FPC's response used the wrong information from its public reports;[2] and counsel for the Commission also indicated that "the Commission does not ne-

[2] Despite an open invitation from the Court to change settlement allocation procedure if the evidence and expertise of the Commission warranted any such change, 511 F. 2d. at 381-383, the Commission made no move to effect any change. This issue was therefore not briefed or argued and, upon expiration of the one-year period, became moot.

[1] Letter of June 2, 1975.

[2] The errors were pointed out in Transco's follow-up letter of June 6, 1975.

cessarily endorse the accuracy of the data . . ., [because] Transco's gas reserve and supply situation is currently the subject of two separate Commission investigations . . . ." Seizing upon this disclaimer by counsel for the Commission, the Court on June 7, 1975, issued an order to show cause why the Court should not require the Commission to subpoena Transco's books and records and investigate in 20 days "the extent of the reduced reserves and the bona fides of Transco and its suppliers in meeting their past and future contract commitments." In the meantime, the Court suggested that it would hold in abeyance any decision . . . concerning Transco's plan for allocating the *allegedly* scarce gas supply . . . ." (emphasis supplied).[1] Despite unanimous opposition to the issuance of the order, primarily on the ground of relevance,[2] the Court did in fact order the subpoena and investigation.[3] Because Transco felt that it was high time to dispel the inferences and innuendoes that the shortage was contrived, Transco opposed the Commission's rehearing request and urged a prompt investigation[1] and for the same reason, Transco did not participate in the Supreme Court proceedings.

[1] We repeat that the allocation method was not in dispute; rather, the only issue briefed, argued and pending was "compensation". Moreover, the "compensation" issue arose from a near-unanimous settlement plan, not "Transco's plan". See, 511 F. 2d. at 381.

[2] In an attempt to be helpful, Transco in its letter advised the Court that "the key question in determining the extent of a current gas shortage is deliverability." Although the Court did not *then* even address this observation, it apparently *now* disagrees with it.

[3] In its accompanying "Memorandum", the majority of the Court cited "five challenging facts" as the bases for its action. One of these "challenging facts" was that "Transco reported the highest proven reserves of gas in its history in 1969, yet less than five years later was reporting shortage as severe that it required curtailments of 43.22% in this coming winter. . ." The actual fact is that Transco reported its highest reserves at the end of 1966, not 1969, as shown in Transco's June 2 and June 6 letters to the Court. Another "challenging fact" was Transco's indicated "reluctance . . . to disclose the extent of committed contractual entitlements which it holds", a wholly unwarranted and baseless

After summary reversal by the Supreme Court on January 19, 1976,[2] the majority of this Court remanded the case to the Commission "to determine whether a real shortage exists."[3] Responsive to that command and acting upon a stipulation entered into by the active parties to the Transco investigation (FPC Docket No. RP75-71), the Commission issued an order on June 25, 1976 finding "that a natural gas shortage does in fact exist on Transco's system." Not satisfied with the Commission's determination, the Court's opinion of November 29, 1976 followed. The majority of the Court has now decided that the "reality" of the shortage cannot be measured in allegation. Still another "challenging fact" was that an admitted non-party to this case, Congressman John Moss, in a letter to the then-chairman of the FPC (with a copy to Chief Judge Bazelon, a member of the panel on this case), advised that the contemplated investigation "is not only justified but essential." Transco finds this last "fact" to be an astounding basis for the issuance of a Court order of any kind, much less an order commanding an investigation which no party to the litigation requested or endorsed.

[1] Attached to Transco's opposition to rehearing was a 1973 Staff study of Transco's Gas Reserve & Deliverability Data for 1971. The principal criticism of Transco's reported reserves in that study was that Transco used the Commission's definition of "proved reserves" instead of a more restrictive definition favored by the Staff. The result of changing the definition would be to further reduce Transco's reported reserves, the opposite of the result that would obtain if there were a "contrived" shortage.

[2] *FPC* v. *Transcontinental Gas Pipe Line Corporation*, 423 U.S. 326 (1976).

[3] Memorandum opinion issued February 6, 1976, at p. 4 (unreported).

terms of deliverable quantities of gas but rather must be determined by whether the pipeline or its producers "by more or less simple acts" could turn "possible" or "probable" reserves into "proved" reserves. The Commission is further ordered to obtain "substantial information regarding the duration, shape and causation of the alleged shortage on the Transco system" before the Court will review the legality of the issue of "compensation".

Transco believes that the issue of "the duration, shape and causation of the shortage" has absolutely nothing to do with the single issue before the Court. Further, the majority's action in this narrow case would logically extend to all FPC actions on curtailment matters and bog down the Commission in a morass of fruitless investigations. Finally, Transco, whose resources are already strained in managing and trying to ameliorate a severe gas shortage on its system without constantly fending off ludricrous charges and insinuations of a contrived gas shortage, desires this case to come to an end. It is therefore requested that rehearing be granted *en banc*. These reasons are more fully developed hereinafter.

II

Reasons for Granting Rehearing En Banc

A. *The Extent, Duration and Causation of the Gas Shortage on the Transco System are Totally Irrelevant to the Compensation Question.*

As noted by Judge MacKinnon in his dissent to the Court's November 29, 1976 order, "[t]he principal concern of the parties and the Commission with the plan is the validity of *any* compensation scheme in a curtailment plan in which priorities are based wholly or in part on end use criteria." (emphasis in original) (p. 5). It is patently clear that the Commission determined in its orders below that *any* type of compensation feature in a

curtailment plan constitutes a *facial violation* of the Natural Gas Act. In establishing a permanent curtailment plan on the Transco system in Opinion No. 778-A, issued December 8, 1976, the Commission confirmed this view by declaring that the orders under review herein "reject[ed] any compensation plan as illegal *per se* . . . ." (*mimeo.*, p. 23). Consequently, the particular depth—or duration—of the gas shortage on Transco's system has no bearing on the strictly legal basis for the Commission's decision. Moreover, the compensation issue as presented to the Court here was in an extremely narrow context. It was presented as a settlement package by parties on both sides of the question of the desirability of compensation (much less its legality) and it covered *only* a one-year period which is long past. Thus, without conceding the relevance to a long-range curtailment plan of the Court's inquiries about the length of depth of curtailments in the future or how permanent a "cross-subsidization" the compensation is intended to be, such questions clearly have no bearing on the one-year settlement that is now history (except for the question of where the escrowed money goes). Thus, insofar as the reality of the shortage could be said to have any nexus with the issue of compensation, it would be whether the curtailment which occurred during the one-year period of the settlement was necessary. And we know of no party (or non-party) who contends it was not.[1]

[1] As a matter of logic, pipelines have no place to "hide" gas. Once gas is received by them from producers, only their pipes and storage fields of very limited capacity can hold the gas; otherwise it must be sold.

B. *The Majority Order Again Oversteps the Bounds of Judicial Review and Is Ordering a Meaningless Investigation.*

The Commission and the active parties to Transco's investigation believed that they were complying with the Court's prior remand "to determine whether a real shortage exists." However, the present opinion of the majority of the panel determines that data regarding "deliverability", i.e., the ability of the wells attached to Transco's system to deliver gas, will not suffice. Rather, the Court says, the Commission must conduct some kind of inquiry in to "the relationship between Transco's present deliverability crisis and its proved reserves, and the reasons for Transco's alleged inability to bring sufficient gas on-stream . . . ." Only then, says the majority, can the Court "assess the nature, extent, and duration of shortage."

The Court goes on to explain why, in its judgment, deliverability "does not necessarily constitute substantial evidence of actual and legitimate long-term shortage." For example, says the Court, the pipeline or its producers might make its proved reserves more deliverable "by more or less simple acts." Also, the pipeline or producer might be able "by physically and economically achievable acts" to move "possible" or "probable" categories into the "proved" reserve category. The court even coins a new term for this latter gas, "provable" reserves.

Aside from the obvious question as to why the Court needs to determine a "long-term" shortage or to assess the "nature, extent and duration of shortage" in the context of the legality of a one-year settlement long since past, Transco simply does not understand what "more or less simple acts" the Court could be referring to or what the "physically and economically achievable acts" are that will create "proved" reserves.[1]

[1] Although the terms "probable" and "possible" are recognized terms in the industry, Transco has no such categories of gas reserves on its books and, in any event, would be precluded by the Commission's regulations from reporting such categories. Moreover, the only way that Transco is aware to "prove" reserves is to drill wells, a function of producers, not pipelines.

Thus, the inquiry ordered by the Court, we submit, will not be meaningful, because it is obviously based on misconceptions and misunderstandings of the natural gas industry. Moreover, although the Court couches its order in terms of lack of "substantial evidence", we submit that the net effect of the latest order is the same (without the time constraints previously imposed) as the August 1, 1975 order which was summarily reversed by the Supreme Court. We respectfully submit that the Court has once again overstepped the bounds of judicial review.

C. *The Court's Order Would Logically Apply to All Curtailment Orders Issued by the Commission.*

"Compensation" is only an ancillary issue to a curtailment order; the heart of the order is the manner of spreading the shortage among the customers of the pipeline. Thus, if the "duration, shape and causation" of the gas shortage is relevant in determining the validity of "compensation", as this Court has thus far held, then it would appear to follow as a matter of logic that the same kind of inquiry must be undertaken on all pipeline systems (because they are all in curtailment) before any curtailment order can be adopted by the Commission. Because this would seem to be the necessary result of the Court's opinion and because such a result would, in Transco's judgment, seriously impair the Commission's ability to deal with curtailments, we believe the Court should reconsider its action here.

III

Conclusion

For the reasons stated hereinabove, Transco respectfully submits that this Court should grant rehearing of its November 29, 1976 opinion and order, and suggest that rehearing *en banc* would be appropriate in the circumstances.

Respectfully submitted,

/s/ Thomas F. Ryan, Jr.
Thomas F. Ryan, Jr.
Robert G. Hardy
Gallagher, Connor and Boland
821 Fifteenth Street, N.W.
Washington, D.C. 2005

Attorneys for Transcontinental Gas Pipe Line Corporation

(Certificate of Service Omitted in Printing)

December 23, 1976

No. 76-1799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION

SUPPLEMENTAL MEMORANDUM OF PETITIONER TRANSCONTINENTAL GAS PIPE LINE CORPORATION

THOMAS F. RYAN, JR.
ROBERT G. HARDY
ANDREWS, KURTH,
CAMPBELL & JONES
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Petitioner
Transcontinental Gas Pipe Line
Corporation

Of Counsel:

BRIAN E. O'NEILL, *Senior Vice*
President and General Counsel
WILLIAM N. BONNER, JR.
Transcontinental Gas Pipe Line
Corporation
Post Office Box 1396
Houston, Texas 77001

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FEDERAL ENERGY REGULATORY COMMISSION

SUPPLEMENTAL MEMORANDUM OF PETITIONER TRANSCONTINENTAL GAS PIPE LINE CORPORATION

In its memorandum to this Court in response to the petition for certiorari, the Federal Energy Regulatory Commission (at that time known as the Federal Power Commission) requested that this case be held in abeyance pending the decision of the United States Court of Appeals for the District of Columbia Circuit in *Elizabethtown Gas Company* v. *Federal Energy Regulatory Commission,* No. 76-1465. Because the *Elizabethtown* case presented the identical question on the merits as was presented to the same court of appeals in the instant case, petitioner Transcontinental Gas Pipe Line Corporation (Transco) acqui-

esced in the Commission's request and this Court has not yet acted upon the petition.

The decision of the court of appeals in *Elizabethtown* was rendered on January 26, 1978 and, while the Commission has committed itself to filing a supplemental memorandum, petitioner Transco also wishes to express its view of the interrelationship of *Elizabethtown* to this case.[1]

1. The issue presented to the court of appeals in *Elizabethtown* was exactly the same as the issue presented to another panel of the same court in the instant case, namely, the legality of a compensation scheme for unequal curtailment of natural gas supply. In *Elizabethtown,* the court had no difficulty in deciding the case on its merits despite the fact that there was no evidence relating to the pipeline's gas supply. In the instant case, however, the court of appeals has three times refused to decide the case on its merits. Instead, on an issue which only it has raised, it has thrice remanded the case to the Commission with various directions to undertake gas supply inquiries. The first time, this Court summarily reversed the court of appeals' action upon a petition filed by the Commission. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation,* 423 U.S. 326 (1976). The second time, the Commission attempted to comply with the court of appeals' mandate "to determine whether a real shortage exists"[2] by certifying to the reality of the shortage based upon record evidence and the stipulation of the parties. This did not satisfy

[1] The lower court's decision in *Elizabethtown* is attached hereto as Appendix A.

[2] Order of February 6, 1976, Appendix E to the petition herein.

the court of appeals, however, and the third remand ensued. It is this third remand, with its instruction to the Commission to determine the "duration, shape and causation" of the shortage on Transco's system, which is the subject of the petition in this case.

What the court of appeals found to be "absolutely essential"[3] to a decision on the merits in this case, was of no concern to a different panel of the same court in *Elizabethtown.* Indeed, the panel in *Elizabethtown,* while determining "the issue on the merits to be relatively simple", showed full awareness of the inconsistent posture and treatment of the *Transco* case and made no effort to distinguish the two cases (Appendix A, pp. 4a, 10a-12a).[4] Transco submits that there is no basis for distinguishing the cases; rather, to paraphrase the words of this Court in the prior chapter, 423 U.S. 326 at 334, it is no longer "conceivable" that any nexus exists between the lawfulness of compensation and the extent of the gas shortage.

2. In its memorandum to this Court, the Commission agreed with Transco that the court of appeals once again seriously overstepped the proper bounds of judicial review by dictating to the administrative agency the type of gas supply investigation which it must undertake. Moreover, while the Commission did not object to granting Transco's petition, it did not itself seek a writ of certiorari because the instant

[3] *Id.*

[4] The opinion in *Elizabethtown* was written by Judge Leventhal who was one of the four judges voting to deny rehearing *en banc* in this case in a 4-4 split. In order to be consistent with his action in *Elizabethtown*, Judge Leventhal today would unquestionably vote to grant rehearing *en banc* and there would be no need for action in this case.

case appeared to be *sui generis* insofar as treatment of gas supply is concerned. While the *Elizabethtown* decision reinforces that view, it also highlights the egregious error committed by the court of appeals in this case in requiring a nebulous inquiry into gas supply on Transco's system before deciding the merits of an issue which every other court has been able to decide without *any* inquiry into gas supply.[5]

3. Over two years ago, this Court determined that "swift and priority consideration"[6] should be given to this case by the court of appeals. Yet, if the kind of esoteric inquiry mandated by the court of appeals is now required, it is likely that another two years or more will go by before there is a decision by the court of appeals on the merits. In the meantime, there is presently being held in escrow for the benefit of one group of Transco customers or another approximately $22.5 million of compensation money (including earnings on the escrow balance) which cannot be distributed until this case is decided on its merits.

4. Under all of the foregoing circumstances, Transco respectfully urges this Court to grant the petition for certiorari, summarily reverse the latest order of the court of appeals as once again invading the rightful province of the Commission, and remand the case

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[5] See also *Mississippi Public Service Commission* v. *FPC*, 522 F. 2d 1345 (5th Cir. 1975), *rehearing denied*, 526 F. 2d 81b, *cert. denied*, 429 U.S. 870 (1976), and *Ft. Pierce Utility Authority of City of Ft. Pierce* v. *FPC*, 526 F. 2d 993 (5th Cir. 1976).

[6] *FPC* v. *Transco, supra*, 423 U.S. at 334.

to the court of appeals with directions to decide this case promptly on its merits.

Respectfully submitted,

THOMAS F. RYAN, JR.
ROBERT G. HARDY
ANDREWS, KURTH,
CAMPBELL & JONES
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Petitioner
Transcontinental Gas Pipe Line
Corporation

Of Counsel:

BRIAN E. O'NEILL, *Senior Vice*
President and General Counsel
WILLIAM N. BONNER, JR.
Transcontinental Gas Pipe Line
Corporation
Post Office Box 1396
Houston, Texas 77001

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1465

ELIZABETHTOWN GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

WASHINGTON GAS LIGHT COMPANY
COLUMBIA GAS TRANSMISSION CORPORATION
COLUMBIA GAS DISTRIBUTING COMPANIES
COMMONWEALTH NATURAL GAS CORPORATION
GENERAL MOTORS CORPORATION, INTERVENORS

Petition for Review of an Order of the
Federal Energy Regulatory Commission

Argued June 17, 1977

Decided January 26, 1978

Judgment entered this date ←

John T. Miller, Jr., for petitioner.

Thomas Walsh, Attorney, Federal Energy Regulatory Commission, for respondent. *Drexel D. Journey*, General Counsel, Federal Energy Regulatory Commission, *Robert W. Perdue*, Deputy General Counsel, *Allan Abbot Tuttle*,

Solicitor and *John H. Burnes, Jr.*, Attorney, Federal Energy Regulatory Commission were on the brief, for respondent. *John J. Lahey*, Attorney, Federal Energy Regulatory Commission also entered an appearance for respondent.

Stephen J. Small with whom *Tilford A. Jones* was on the brief for intervenor, Columbia Gas Distribution Companies.

Edward J. Grenier, Jr., Richard P. Noland, Robert R. Morrow, Frazer F. Hilder and *Julius Jay Hollis* were on the brief, for intervenor, General Motors Corporation.

John D. Daly, Giles D. H. Snyder, Leonard Sargeant, III, and *William P. Saviers, Jr.*, were on the brief, for intervenor, Columbia Gas Transmission Corporation.

Lewis Carroll, Monte R. Edwards and *Susan A. Low* were on the brief, for intervenor, Washington Gas Light Company.

James O. Watts, Jr., entered an appearance for intervenor, Commonwealth Natural Gas Corporation.

Before: LEVENTHAL and ROBB, *Circuit Judges* and RONALD N. DAVIES,* *Senior United States District Judge* for the District of North Dakota.

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge*: In this case, we rule that the Federal Power Commission has the power to require compensation as part of a curtailment plan. We remand to the Federal Energy Regulatory Commission, as the successor to the FPC,** for consideration of whether such compensation should be provided.

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* Sitting by designation pursuant to Title 28, U.S.C. § 294(d).

** See 42 U.S.C. § 7101 et seq., § 7295(c) (Supp. 1977).

The issue arises out of orders of the FPC relating to two successive interim curtailment plans for the interstate natural gas pipeline transmission system of Columbia Gas Transmission Corporation (Columbia). The appeal is by Elizabethtown Gas Co. (Elizabethtown), one of the public utilities that buys natural gas from Columbia for resale to consumers.

Elizabethtown opposed each of the plans on the ground that it unfairly failed to compensate the customers of Columbia which received less than their pro rata share of gas. The Commission approved the plans, rejecting Elizabethtown's claim on the ground that it lacked jurisdiction under the Natural Gas Act to order or approve any curtailment plan that included a compensation feature. The appeals have been consolidated.

As indicated at the outset, in our view, the Commission does have the power to require compensation as part of a curtailment plan. We remand for a determination in appropriate proceedings whether or how this power should be exercised.

I. PROCEDURAL BACKGROUND

The procedural background of these pending appeals is of considerable complexity. To aid reader understanding, we have presented that background in some detail in Appendix A to this opinion, and confine ourselves at this point to a brief statement that Elizabethtown contends that the interim curtailment plans approved by the FPC are unlawful (as constituting undue preference and for other reasons) because the plans do not provide a compensation feature, whereby purchasers who receive more than their pro rata share of gas pay a surcharge, and purchasers who receive less than their pro rata share of gas receive compensation out of the proceeds of the surcharges.

II. Commission's Authority to Employ a Compensation Provision

On the merits, these appeals pose the question whether the FPC was correct in its construction of the Natural Gas Act, when it determined that a compensation scheme is impermissible under the Act as a matter of law.

As set forth in Appendix A, the Commission's position emerged in these proceedings in the course of procedural rulings in the handling of a Columbia plan that contained a compensation feature. Columbia then dropped the compensation feature ("under duress") in the next interim plan(s) proposed to the FPC, and those interim plans were in due course approved. The FPC has rejected Elizabethtown's petitions for rehearing, which sought a compensation feature, and in doing so has relied on its opinion in the *Transco* case.[1] Another opinion and order of the Commission to similar effect has been reversed by the Fifth Circuit and certiorari has been denied. *Mississippi Public Service Commission v. FPC*, 522 F.2d 1345 (5th Cir. 1975), *cert. denied*, 45 L.W. 3254 (S.C. Oct. 4, 1976).

Although the procedural situation is complicated almost beyond belief, we find the issue on the merits to be relatively simple. In brief, we agree with the reasoning of Judge Bell in *Mississippi Public Service Commission*, and with his reliance upon the language of the Supreme Court in *FPC v. Louisiana Power and Light Company*, 406 U.S. 621 (1972).

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[1] Transcontinental Gas Pipeline Corporation, FPC Docket No. RP72-99, orders of Nov. 12, 1974 and Jan. 10, 1975. On appeal, as noted in Appendix A, this court did not reach the compensation issue, and Transcontinental has sought certiorari on the ground that this court erred in its remands, and requirements for further consideration, without ruling on the compensation issue.

In the latter case, the Court dealt with a somewhat different issue—that of the Commission's authority to regulate curtailment of direct interstate sales of natural gas—but its construction of the Act is relevant to the case at bar. In finding authority for such curtailment in the Commission's *transportation* jurisdiction, the Court noted that the Commission has broad powers to meet its responsibilities under that aspect of its jurisdiction. The Commission

> must be free, "within the ambit of [its] statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances." *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942). Section 16 of the Act assures the FPC the necessary degree of flexibility in providing that: "The Commission shall have the power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act . . . ." 15 U.S.C. § 717o. In applying this section, we have held that "the width of administrative authority must be measured in part by the purposes for which it was conferred . . . . Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority." Permian Basin Area Rate Cases, 390 U.S. 747, 776 (1968). . . .

406 U.S. at 642.

No compensation feature was involved in the curtailment plan at issue in *Louisiana Power and Light*. That case did, however, turn on an expansive view of the Commission's latitude to make "pragmatic adjustments which may be called for by particular circumstances," and the statutory grant of "necessary degree of flexibility" as necessary or appropriate to further the Congressional objective. In our view, this embraces the authority to employ a compensation feature as part of a curtailment

plan where necessary or appropriate to promote the policies of the Natural Gas Act.[2]

Implicit in the Commission's handling of the case at bar is its view that it was inconsistent to require a pur-

[2] *Cf.* Cities Service Company v. FEA, 529 F.2d 1016 (Temp. Emer. Ct. App. 1975), *cert. denied,* 426 U.S. 947 (1975), where the court was confronted with a problem of statutory interpretation similar to that of the case at bar, arising within the same general context of the national energy crisis. In finding that the FEA had authority under § 4(a) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 628, as amended, 15 U.S.C. § 753(a) (1976), to promulgate the Old Oil Entitlements Program, 10 C.F.R. § 211.67, the court held that "[a] proper interpretation of the Allocation Act and its provisions requires recognition of the fact that the authority under Section 4(a) must be read together with the objectives [set forth in Section 4(b)] which the exercise of that authority is to obtain." 529 F.2d at 1022.

In Niagara Mohawk Power Corporation v. FPC, 126 U.S. App.D.C. 376, 381-83, 379 F.2d 153, 158-60 (1967), this court held, more generally, that an act that entrusts a broad subject-matter to administration by an agency should be read to provide the agency with sufficient authority to implement the purposes and policies of Congress. "[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives." *Id.* at 382, 379 F.2d at 159. [Citations omitted.] We further observed that "[t]he principles of equity are not to be isolated as a special province of the courts. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law. The courts may not rightly treat administrative agencies as alien intruders poaching on the court's private preserves of justice. Courts and agencies properly take cognizance of one another as sharing responsibility for achieving the necessities of control in an increasingly complex society without sacrifice of fundamental principles of fairness and justice." *Id.* at 383, 379 F.2d at 160. [Citations omitted.]

chaser to provide for compensation in order to obtain rights to deliveries of natural gas when those deliveries were properly allocated to him. The Commission argues, for example, that a compensation scheme, by rewarding low priority users and penalizing high priority users, is "inconsistent with the theory and purpose of end use curtailment." (Br. at 20).

In human affairs generally our society owns a deep-seated conviction that, to use Emerson's words in the influential essay on Self-Reliance, a man should not be required to "pay for a privilege where [he has] intrinsic right." That principle does not answer the question, however; it rather bids us to focus on defining the "right" that is involved.

The decision that a system of priorities is mandated by fundamental policy considerations does not, in our view, necessarily imply that priority status should be entirely unburdened. The question of whether, and how, to provide compensation may well turn on the fairness of balancing the benefit accorded a high-priority purchaser with a charge that offsets, at least in part, the added expense imposed by a curtailment plan upon a lower-priority purchaser.[3] We do not attempt to resolve this question on the present facts. We hold, merely, that it is open to the Commission to consider employing a compensation feature.[4]

In order that the Commission may proceed, on the premise of legal authority, to consider whether and how

[3] The issue of fairness is an issue of policy for the Commission. Our function is only to consider the issue of law whether the Commission has the legal authority to implement that policy of fairness.

[4] Our opinion in State of Louisiana v. FPC, 175 U.S. App. D.C. 104, 533 F.2d 1239 (1976), is not to the contrary. We there assumed, without deciding, that the Commission had authority to impose a compensation feature as a condition upon the granting of a certificate of public convenience and necessity, but held that no showing had been made, under the peculiar facts of that case, that the public interest required compensation. 175 U.S. App. D.C. at 110, 533 F.2d at 1245.

a compensation feature should be or should have been included, we remand for further consideration by the Commission, in appropriate proceedings, of an interim curtailment plan.[5]

So ordered.[6]

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[5] We do not vacate the orders of the Commission. The Commission may conclude that those orders should be retained. Portland Cement Ass'n v. Ruckelshaus, 158 U.S.App.D.C. 308, 486 F.2d 375 (1973); Portland Cement Ass'n v. Train, 168 U.S.App.D.C. 248, 513 F.2d 506 (1975).

[6] Washington Gas Light Company filed a suggestion of mootness in No. 75-1767, based on the fact that no Columbia customer requested or took more than its pro rata share of gas during the period May 1, 1975 to October 31, 1975. (As explained in Appendix A, that is the period governed by the 1974 interim curtailment plan, as extended in time and modified to omit the compensation feature originally in Columbia's 1974 plan.)

Elizabethtown's response develops a contention that the 1974 plan, as modified, presents a live issue because its disposition affects the proper handling by the Commission of the 1975 plan.

In American Smelting and Refining Co. v. FPC, 161 U.S. App.D.C. 6, 494 F.2d 925 (1974), we held that the Commission, in remedying unjust or discriminatory rates, is required by § 5(a) of the Act to proceed in two steps, by finding, first, that an existing condition is unjust or discriminatory, and then prescribing the remedy for that condition. *Id.* at 21-22, 494 F.2d at 940-41. Under the approach there enunciated, the proponent of an existing plan would, indeed, enjoy some advantage deriving from considerations of burden of proof. But we dealt there with an existing plan; here, by contrast, the curtailment plan challenged in No. 75-1767 expired of its own force. Elizabethtown cannot, consequently, derive any procedural advantage from *American Smelting* on remand. Naturally, the Commission's findings of fact will be required to meet the substantial evidence test, and its action in settling upon a new interim curtailment plan must not be arbitrary or capricious. We believe these standards provide ample procedural protection for Elizabethtown.

The appeal in No. 75-1767 stands dismissed for mootness.

APPENDIX A: PROCEDURAL BACKGROUND

On December 15, 1971, Columbia filed with the Commission a curtailment plan providing for pro rata curtailment of large wholesale customers in the event of gas shortages. The plan included an exemption from curtailment to protect residential and commercial service, and a compensation provision to reimburse customers who might suffer greater than pro rata curtailment as a result of the exemption provision. After a period of suspension by the Commission, the plan was made effective on Columbia's motion as of April 1, 1972, and continued in effect until November 1, 1972.[1]

1972 INTERIM PLAN

On September 29, 1972, the Commission approved an interim settlement curtailment plan with similar provisions, to be effective until July 1, 1974. Under this plan, buyers who took advantage of the exemption provision to purchase more than their pro rata share of gas were subject to a surcharge on such exempt volumes of $1.65 per Mcf during the months of November through March, and 50¢ per Mcf during the months of April through October. The proceeds of this surcharge were to be used by Columbia to compensate the purchasers who, in effect, freed up the exempt volumes by receiving less than their pro rata share of gas.[2] The compensation feature was intended by Columbia to "provide[] an incentive for its customers to develop their own peak shaving facilities,

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[1] R. 360-62, 363-64, 364A, 364B.

[2] Compensation was fixed at $1.65 per Mcf of curtailment in excess of ratable curtailment during the cold-weather months, provided that the excessively curtailed buyers or their distributor customers utilized all gas supply sources available, including peak shaving—and then only to the extent that peak shaving was utilized as a result of the additional curtailment. Otherwise, conspensation during the cold weather months was at the rate of 50¢ per Mcf. Compensation during the warmer months was fixed at 50¢ per Mcf.

. . . to preclude customers from requesting exempt volumes except when actually needed to protect firm non-industrial loads, and [to] compensate[] customers providing the exempt volumes for using their own peak shaving facilities." [3]

1974 Interim Plan

On June 6, 1974, the Commission granted Columbia's motion to extend this interim curtailment plan until April 30, 1975.[4] However, on January 24, 1975, and March 25, 1975, the Commission, acting on the complaint of Washington Gas Light Company (WGL) (a customer of Columbia), issued orders reflecting a change in its appraisal of the compensation feature. While the mandate of these orders was simply to set a date for formal hearing of WGL's complaint, the Commission's language made it clear that it now regarded the compensation feature as illegal.[5]

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[3] Record at 381 (hereinafter cited as R. ——).

[4] R. 781-91.

[5] The order of January 24, 1975, noted that the Commission had concluded in its orders of November 12, 1974 and January 10, 1975, in Transcontinental Gas Pipe Line Corporation (Transco), Docket No. RP 72-99, that

> a compensation plan similar to the one now before us was unacceptable as a matter of law because it is discriminatory, fixes rates unrelated to costs, and does not comply with the filing requirements of Sections 4 and 7 of the Natural Gas Act because the transfers would involve sales. It was further concluded that the compensation plan was unacceptable as a matter of policy because of its inherent inequity. The Commission recognized, however, that its position was subject to judicial review, and provided that notwithstanding the Commission's views as to unlawfulness the plan should remain in effect as provided by the Ccurt of Appeals pending further order. Pending hearing and final decision, no change in Columbia's rates shall be effective, nor any transfer of entitlements among Columbia's customers be effectuated

> unless and until appropriate certificate and rate filings have been made and approved in accord with Sections 4 and 7 of the Act.

R. 874, J.A. at 276. And in its order of March 25, 1975 (formally a response to Columbia's petition for clarification of, or application for rehearing of, the January 24 order) the Commission reiterated its position.

> We deny so much of the applications as seek to have us withdraw the language in the January 24, 1975, order relating to sales for resale in interstate commerce which may be attempted by Columbia's customers under the purported authority of our June 6, 1974, order approving Columbia's interim curtailment plan. We have determined that sales for resale between and among pipeline customers, even when attempted in the guise of "compensation features" of a curtailment plan, are subject to Sections 4 and 7 of the Natural Gas Act. See *Transco, supra; Northwest Pipeline Corp.*, Docket No. RP74-49, order issued February, 1975; *Consolidated Natural Gas Company*, Docket No. RP73-115, order issued January 15, 1975. We are without power to waive compliance with the statute itself; accordingly, any sales by and between Columbia's customers can lawfully be made only after compliance with the statute and regulations thereunder.
>
> We have not forbidden implementation of Columbia's interim curtailment plan; indeed we expect allocation of Columbia's supplies to be made in strict conformity therewith until expiration of the interim plan. We have attempted to make clear, however, that sales for resale among Columbia's customers are unlawful unless and until the requirements of Sections 4 and 7 have been met.

R. 895-96; J.A. at 282-83.

The *Transco* case, upon which the Commission relies in these passages, involved a curtailment plan with a compensation feature similar to that of the case at bar. The plan was filed by Transcontinental Gas Pipeline Corporation (Transco) in September 1974. The Commission found the compensation feature unlawful for reasons stated in the quoted passages of the Commission's orders in the present case. Transco sought review of the Commission's determination in this court. On August 1, 1975, another panel of this court remanded the case to the Commission for further investigation of the need

Columbia's 1974 interim curtailment plan was due to expire on April 30, 1975. On April 1, 1975, Columbia filed a motion with the Commission requesting an extension of that interim curtailment plan for six months.[6] In light of the Commission's new appraisal of the compensation provision, however, Columbia felt that it had "no alternative but to propose an extension of its interim plan as modified to exclude said compensation features." [7] Columbia expressed disagreement with the Commission's determination of illegality, but stated that it felt itself "under duress" of the Commission's orders.[8]

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for curtailment. Subsequently, the case has returned to this court twice, and the panel has twice more remanded it, Transcontinental Gas Pipe Line Corporation v. FPC, No. 74-2036 (D.C. Cir. Feb. 6, 1976) (unpublished per curiam); Transcontinental Gas Pipe Line Corporation v. FPC, No. 74-2036 (D.C. Cir. Nov. 29, 1976), without reaching the merits of the legality of the compensation provision. Following the most recent refusal of this court to decide the compensation issue, Transco sought Supreme Court review, 46 U.S.L.W. 3022 (U.S. June 17, 1977) (No. 76-1799), on the grounds that this court exceeded the proper scope of judicial review by ordering a remand to determine the "duration, shape, and causation" of the alleged gas shortage; and that the "duration, shape, and causation" of the shortage had no substantial bearing on the legality of the compensation scheme.

The Commission has suggested to the Supreme Court that it defer ruling on Transco's petition for certiorari until we decide the present case. Memorandum for the Federal Power Commission (in response to *Transco's* petition for a writ of certiorari) at 10-12, Transcontinental Gas Pipe Line Corporation v. FPC, S.Ct. No. 76-1799.

[6] The matter of a permanent curtailment plan for Columbia was still pending before the Commission, but there was no chance that the Commission could issue an order on a permanent plan to become effective before the interim plan expired.

[7] R. 898.

[8] R. 905.

By order of April 25, 1975, the Commission granted Columbia's motion to extend the 1974 interim plan, (modified to delete the compensation feature) for a six-month period ending October 31, 1975.[9] Elizabethtown's application for rehearing was denied, and it filed an appeal with this court.[10]

1975 Interim Plan

Because of continuing doubts as to when a permanent curtailment plan for Columbia would be approved, Columbia and Armco Steel Corporation presented to the Commission, on July 2, 1975, competing proposals for a new interim curtailment plan, to take effect beginning November 1, 1975. Both of these proposals effected curtailment through a system of priorities of service (ranging from high-priority residential service to low-priority large-volume industrial boiler fuel use) rather than through the pro rata cutback approach, with exemptions, employed in Columbia's earlier curtailment plans. Elizabethtown opposed both proposals because of their failure to include a compensation provision to ameliorate what Elizabethtown regarded as disproportionate allocations of shortages.

By order of October 31, 1975, the Commission prescribed Columbia's 1975 Plan as an interim curtailment plan for the period November 1, 1975 through March 31, 1976 "and thereafter subject to further order of the Commission." [11] It rejected the contentions of Elizabethtown concerning the need for a compensation provision, referring to its previously expressed views on this matter.[12]

Elizabethtown applied for rehearing on the ground, *inter alia*, that this curtailment plan created undue preferences, and lacked a compensation feature that would

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[9] R. 1054-58; J.A. at 305-09.

[10] Elizabethtown Gas Co. v. FPC, D.C. Cir. No. 75-1767.

[11] R. 21487, J.A. at 527.

[12] R. 21484, J.A. at 524A.

redress these preferences and induce the favored buyers to exercise self-help.[13]

By order of March 26, 1976, the Commission denied Elizabethtown's application for rehearing. Elizabethtown filed an appeal with this court [14] asking that the Commission be required to institute a compensation feature, retroactive to November 1, 1975.

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[13] In its application for rehearing, Elizabethtown also argued that the Commission had improperly "rejected" the interim curtailment plan that was in effect through October 31, 1971. In the view of Elizabethtown, the Commission was constrained by American Smelting and Refining Co. v. FPC, 494 F.2d 925, 940-41 (D.C. Cir. 1974), to expressly find unlawful the curtailment plan that expired on October 31, 1975, before "replacing" it with the priorities-of-service plan.

[14] Elizabethtown Gas Company v. FPC, D.C. Cir. No. 76-1465.

Supreme Court, U. S.
FILED
JUN 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1799

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner

v.

FEDERAL POWER COMMISSION

BRIEF OF ELIZABETHTOWN GAS COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN T. MILLER, JR.
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorney for
Elizabethtown Gas Company

June 1977

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1799

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner

v.

FEDERAL POWER COMMISSION

BRIEF OF ELIZABETHTOWN GAS COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Elizabethtown Gas Company (Elizabethtown), one of the petitioners in the Court below, and therefore, a party herein (Rule 21(4)), urges this court to grant the petition for writ of certiorari summarily and effect an immediate remand to enable the Court of Appeals to reverse expeditiously a Federal Power Commission (FPC) holding that compensation provisions in gas pipeline curtailment plans are *per se* unlawful.

STATEMENT

Transcontinental Gas Pipe Line Corporation (Transco) owns and operates an interstate natural gas pipe-

line system extending from Texas to New York City from which it serves one firm direct industrial customer and 80 firm wholesale (sale for resale) customers which in turn supply residential, commercial and industrial consumers. The Federal Power Commission regulates the transportation and sale of gas by Transco. Local authorities regulate the operations of Transco's wholesale customers.

Elizabethtown is a public utility distributing natural gas in 68 communities serving over 183,000 consumers under regulation by the New Jersey Board of Public Utility Commissioners. Elizabethtown has been in the gas distribution business for 125 years. Prior to the initiation of natural gas service by Transco in 1951, Elizabethtown manufactured the gas that it sold to consumers. Transco is Elizabethtown's principal natural gas supplier today.

Due to insufficient gas supplies, Transco has been curtailing firm gas service on its system for over three years. The shortages are continuous, year round and worsening.[1] Until November 1, 1976, curtailments were governed by interim curtailment plans filed by Transco with the FPC.

From November 1971 through October 1974, curtailment plans in effect on the system of Transco contained compensation provisions to offset disproportionate curtailments afforded wholesale customers asking for such treatment.[2] By order issued November 12, 1974 the

[1] Transco curtailed 7.41% in 1972-73. Transco has announced that it expects to curtail 49.3% during the 1977-78 winter.

[2] See *Transcontinental Gas Pipe Line Corporation*, 46 F.P.C. 1212, 1213 (1971); 48 F.P.C. 1060, 1061 (1972).

FPC denied a motion to approve an interim settlement agreement (ISA), intended to effect an interim plan for the period November 16, 1974 through November 15, 1975. The plan contained a compensation provision which the Commission, through a reversal of its prior position, found to be illegal *per se*. The appeals in the court below are from the November 12, 1974 order. *Transcontinental Gas Pipe Line Corp.* v. *FPC*, D.C. Cir. Nos. 74-2036, *et al.*

The court of appeals overruled the FPC, ordered the ISA into effect and directed that the compensation payments be deposited by Transco in escrow.[3] Transco's wholesale customers receiving a disproportionate share of the available gas paid $18.9 million in compensation into escrow during the year the ISA was in effect.

Due to two digressions, the court below has not yet reached the issue whether the FPC was in error in holding on November 12, 1974 that a compensation provision in a curtailment plan is *per se* unlawful. First, the court ordered the FPC to conduct an inquiry into Transco's gas supply situation and report the results to the court within a specified time. This order was overruled in *FPC* v. *Transcontinental Gas Pipe Line Corporation*, 423 U.S. 326 (1976). Second, the lower court indicated by its November 29, 1976 order that it will not consider the appeals further until the FPC presents to the court the results of further gas supply studies. No time limit was imposed. This second order is now before this court.[4]

[3] See *Consolidated Edison Company of New York, Inc.* v. *FPC*, 511 F.2d 372 (D.C. Cir. 1974).

[4] See Petition for Writ of Certiorari, Appendix A.

Meantime, the fact that the court below had failed to resolve the issue of the asserted *per se* illegality of compensation was used by the FPC as a reason for refusing to include a compensation provision in the permanent curtailment plan established for the Transco system by Opinion 778 issued October 8, 1976 in *Transcontinental Gas Pipe Line Corporation*, Docket RP72-99.[5] Compensation was left as the subject of a deferred hearing, no date for which has yet been set. By Opinion 778-A, issued December 8, 1976, the Commission rejected applications for rehearing on the compensation issue, justifying its action in large measure by reference to the court's November 29, 1976 order.[6]

REASONS FOR GRANTING THE WRIT

1. The lower court's order of November 29, 1976 deprives parties of speedy court review of a question of law already decided by another Court of Appeals.[7] The court below has placed itself in a position where it will not come to grips with the basic issue whether the

[5] This is the same curtailment proceeding in which the FPC order of November 12, 1974, striking down the ISA, was issued. The Opinion 778 curtailment plan was made effective November 1, 1976.

[6] For the information of the court, relevant pages of Opinion 778-A are set out in Appendix AA to this brief. Elizabethtown's challenge of Opinions 778 and 778-A has been consolidated with other appeals in a proceeding entitled, *State of North Carolina et al.* v. *FPC.*, D.C. Cir. Nos. 76-2102, *et al.* Briefs have been filed therein and the matters await oral argument.

[7] See Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b). Relevant statutory provisions may be found in Appendix BB to this brief.

Commission was in error in holding that it is *per se* unlawful to include a compensation provision in a curtailment plan. This not only blocks any disposition of the funds held in escrow but, more importantly, the court's order is used to stonewall inclusion of a compensation provision in the pipeline company's permanent curtailment plan.

A. The Fifth Circuit has already rejected the Commission's *per se* illegality holding on review of an FPC order which relied on the logic of its November 12, 1974 action in the *Transco* case.[8] *Mississippi Public Service Commission* v. *FPC*, 522 F.2d 1345 (5th Cir. 1975). The Court held:

> "It seems to us, however, that compensation payments are not 'rates' but in the nature of surcharges imposed in the context of a curtailment plan to insure that the burdens of curtailment are spread evenly and equitably among those affected by such plans. . ." (522 F.2d at 1350)
>
> "In sum, we conclude that the imposition of compensation payments as a condition for the receipt of higher priority gas is within the statutory power of the FPC over the movement of such gas in interstate commerce." (*Idem.*)

[8] "The Commission noted that it had taken similar action in another but unrelated proceeding, and incorporated the reasoning in the orders in the other proceeding by reference.[8]

[8] *Transcontinental Gas Pipe Line Co.*, FPC Docket No. RP72-99, Order Finding An Emergency On Transco's System and Denying Motion for Interim Settlement As to Curtailment Rules, November 12, 1974, and Order Granting Rehearing in Part, Denying Rehearing In Part, and Requiring Environmental Impact Statement, January 10, 1975, *pending review sub nom. Transcontinental Gas Pipe Line Corp., et al.* v. *F.P.C.*, D.C. Cir., Nos. 74-2036, et al. (argued May 21, 1974). . . ."

522 F.2d at 1348.

The FPC sought review by this Court, citing the pendency in the court below of the compensation issue in the *Transco* case and three others.[9] Nonetheless, the petition for writ of certiorari was denied. *FPC* v. *Mississippi Public Service Commission,* —— U.S. ——, 97 S. Ct. 181 (1976).

B. The court, without a decision on the merits, has placed the FPC in a position where it can frustrate indefinitely the efforts of those seeking to remedy an inequitable and unduly preferential curtailment plan for the Transco system through a compensation provision.

Gambling on a possible conflict of circuits, the Commission has refused to apply the holding in *Mississippi Public Service Commission* to the Transco pipeline system in subsequently establishing a permanent curtailment plan.

> "The Supreme Court denial of our petition for certiorari of the *Mississippi Public Service Commission* decision, *supra* note 10, increases the need for the court in No. 74-2036 to issue its decision, but it does not warrant our prejudicing No. 74-2036. . . ." (Appendix AA, p. 4a)

A vacuum has been created. As the FPC controls the allocation of its personnel and the priority of work

[9] See Petition for Writ in *FPC* v. *Mississippi Public Service Commission,* No. 75-1678, p. 10, n. 4. Of the other three cases there cited by FPC, *Consolidated Gas Supply Corp.* v. *FPC,* D.C. Cir. No. 75-1324 was dismissed on June 24, 1977 on joint motion of both parties; *Elizabethtown Gas Co.* v. *FPC,* D.C. Cir. No. 75-1767 was dismissed on June 13, 1977 as moot; and *Elizabethtown Gas Co.* v. *FPC,* D.C. Cir. No. 76-1465 was the subject of oral argument on June 17, 1977.

assignments, the Commission can postpone indefinitely the gas supply studies contemplated by the November 29, 1976 court order and, thereby, a resolution of the compensation issue. This places those who are challenging the Commission's basic legal premise in the position where they are effectively denied relief from an erroneous Commission decision. The "effects of curtailment, even over the short term, can be irrevocable." *Consolidated Edison Company of New York, Inc.* v. *FPC,* 512 F.2d 1332, 1343 (D.C. Cir. 1975).

2. It is not the depth of the pipeline gas shortage but the disproportionate sharing of the available gas supplies in time of shortage that gives rise to the need for compensation payments under the antipreference provisions of Section 4(b) of the Natural Gas Act.[10] The Fifth Circuit recognized this important difference in *Mississippi Public Service Commission* when it referred to the need to spread the burdens "evenly and equitably among those affected by such plans";[11] the court below did not when it called for further gas supply studies.

A. Certain of Transco's customers are receiving more than a proportionate share of the available low cost pipeline gas. While the preference is expressed in terms of assuring continued safe service to high priority consumers who cannot readily convert to other fuels, in fact one of the ultimate causes is the failure of the local distribution company to take the steps necessary to assure that sufficient supplemental gas sup-

[10] 15 U.S.C. 717c(b). Section 4(b) is the standard by which curtailment plans are to be judged. *FPC* v. *Louisiana Power & Light Co.,* 406 U.S. 621, 642 (1972).

[11] 522 F.2d at 1350.

plies will be on hand for the purpose. The pipeline can deliver the larger volumes to such wholesale customers only if other wholesale customers are in a position to get along with less gas either because they have made provisions for supplemental supplies or they are prepared to forego for a time certain of their sales.

If the favored wholesale customer could "payback" the excess volumes by taking less gas from the pipeline supplier at another time of the year, the prejudice to other customers might not be undue. But pipeline curtailments are now so deep that that form of offset to an undue preference is no longer practical.[12]

It is well to remember that the interstate pipeline companies regulated by the FPC are not public utilities. They enjoy no monopoly in providing gas service in any part of the country.[13] Nor do they have the concomitant obligation to serve. As their natural gas supplies dry up, they withdraw from the scene. The FPC's responsibilities fade away simultaneously, as it cannot commandeer a gas supply for an interstate pipeline or oblige it to continue service when its committed reserves are gone.[14]

The wholesale customers of the pipelines cannot shed their public utility service obligations that easily. It may make sense, for a time, for such wholesale customers to give up a part of their pipeline supply to another public utility in difficulties. But there must be redress for the consequential economic injury and a built-in incentive for the advantaged public utility to assume its proper burden of meeting local market requirements from supplemental gas supplies of its own devising. Compensation provisions, properly designed, serve both purposes.

B. Compensation payments do not originate with the pipeline company. Through billing adjustments, the pipeline company serves only as a conduit facilitating payments by advantaged customers to disadvantaged customers so that shortages may be shared equally.

Compensation payments are not surrogates for the payment of damages by the pipeline company where the supply shortage is caused by its negligence, bad faith, improvidence, or breach of contract. See *Monsanto Co.* v. *FPC,* 463 F.2d 799, 808 (D.C. Cir. 1972).

A curtailment case before the FPC is concerned with who gets the available gas; not with the liability of the pipeline for having caused the shortage.[15] Therefore, the detailed examination of Transco's gas supplies called for by the order of the court below is not warranted.

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[12] *Consolidated Edison Co. of New York* v. *FPC,* 512 F.2d 1332, 1343 (D.C. Cir. 1975).

[13] See Sections 7(a) and 7(g) of the Natural Gas Act, 15 U.S.C. 717f(a) and 717f(g); *Granite City Steel Co.* v. *FPC,* 320 F.2d 711 (D.C. Cir. 1963).

[14] See *Public Service Commission of New York* v. *FPC,* 463 F.2d 824, 830 (D.C. Cir. 1972); *Panhandle Eastern Pipe Line Co.* v. *FPC,* 204 F.2d 675, 679 (3d Cir. 1953).

[15] The discussion by the court below with reference to the need to curtail (Slip Op. pp. 10-11), refers to the Commission's decision in *United Gas Pipeline Co.,* 49 F.P.C. 1211, 1220 (1973) which was vacated in *State of Louisiana* v. *FPC,* 503 F.2d 844, 864 (5th Cir. 1974). There the court stated: "FPC should bear in mind that the question here is not whether United should 'bear responsibility for the shortage on its system'; rather it is who should get the gas that is now available."

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

JOHN T. MILLER, JR.
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorney for
Elizabethtown Gas Company

June 1977

APPENDIX

APPENDIX AA

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 778-A

Docket No. RP72-99

Transcontinental Gas Pipe Line Corporation

Opinion and Order Granting in Part and Denying in Part Petitions for Rehearing

Issued: December 8, 1976

• • •

VII. Compensation

Elizabethtown, South Jersey, North Carolina, Con Ed and Piedmont apply for rehearing of the deferral of the compensation question pending judicial resolution of the third interim settlement agreement compensation provision in *Transcontinental Gas Pipe Line Corporation* v. *FPC*, No. 74-2036 (D.C. Cir.). Together or separately they make the following arguments in favor of presently implementing a compensation provision:

> 1.) There is record evidence supporting imposition of compensation payments (to cover revenue losses or cost of supplemental supplies) so as to mitigate the disproportionate impact of curtailment. 2.) Commission authority to order compensation has been judicially determined, so as to preclude further Commission deferral of the issue.[10] 3.) It is error to defer this

[10] *Mississippi Public Service Commission* v. *F.P.C.*, 522 F.2d 1345 (5th Cir. 1975), *reh. denied en banc* 526 F.2d 816 (1976), *cert. denied*, 45 U.S.L.W. 3254 (October 4, 1976); and *Fort Pierce Utility Authority* v. *FPC*, 526 F.2d 993 (5th Cir. 1976).

issue pending a court decision in No. 74-2036 because that appeal relates to a different compensation arrangement. 4.) The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit over the appeal in No. 74-2036 is questionable because its February 6, 1976, remand to the Commission could divest its jurisdiction under its own Rule 13(d), as the Commission allegedly recognized. 5.) No permanent curtailment plan can be established absent final disposition of the compensation question.

Brooklyn and PSE&G, on the other hand, seek rehearing of the deferral of the compensation question, arguing that the Commission should have definitively rejected the compensation proposals.

We deny the several applications for rehearing of the deferral of the compensation question. Subsequent to our decision in Opinion No. 778 to defer further consideration of the compensation question until the then hoped for imminent D.C. Circuit decision resolving the compensation issue in No. 74-2036, that court handed down an opinion [11] which not only fails to resolve the controversy but also forbodes a substantial period before a final judicial statement will be forthcoming. A divided three judge panel has found our June 25, 1976, order in response to its February 6, 1976, remand of the record in No. 74-2036 to be inadequate for its purposes, which are to determine whether there is in fact a gas shortage on the Transco system before it decides the compensation appeal before it. The court was specifically disenchanted with the Commission's June 25, 1976, forwarding of exclusively deliverability evidence. In order to obtain substantial information regarding "the duration, shape and causation of the alleged shortage on the Transco system," the court has remanded the record

[11] *Transcontinental Gas Pipe Line Corporation, et al.* v. *FPC*, No. 74-2036 (D.C. Cir. November 29, 1976).

for supplementation as to whether there "[a]re sufficient volumes of gas available as proved or provable reserves so that greater total deliverability can be foreseen in the short-term future?"

As Judge MacKinnan astutely perceived in his dissenting opinion, this remand will require "an extensive and complex investigation, study and report." Accordingly, final resolution of the compensation issue in No. 74-2036 can no longer be seen as imminent. Such delay is all the more distressing in that, as Judge MacKinnon also notes, the appeal presently before the court is to the Commission's November 12, 1974, and January 10, 1975, orders rejecting any compensation plan as illegal *per se*, which could be decided without need for this remand of the record.

The present condition of uncertainty on the compensation question engendered by this remand of the record, *supra* note 11, is heightened by the 5th Circuit's ruling on compensation in *Mississippi Public Service Commission* v. *FPC*, *supra* note 10; however, Opinion No. 778 does not do violence to that legal precedent because we found therein (slip op. at 69) that the "instant record is insufficient to permit adequate deliberation." [12] This prior finding of insufficient record evidence is moreover compelled by the D.C. Circuit's most recent remand, *supra* note 11, for the present record clearly does not include evidence concerning Transco's "provable" reserves, that which the D.C. Circuit finds essential to determining "the legality of the compensation scheme at issue here." Accordingly, without abandoning our legal position in No. 74-2036, we reject the compensation arrangements proposed during the permanent curtailment plan proceeding and pursued on

[12] It must be remembered that the permanent plan record was closed before the Commission ruled in November 1974, that compensation is illegal *per se*. Accordingly, the parties were permitted to introduce evidence on compensation, but that evidence is insufficient to warrant imposition of a compensation plan.

brief. Of course the proponents of compensation are always entitled under Section 5 of the Natural Gas Act to initiate a complaint proceeding against the absence of a compensation provision in Transco's permanent curtailment plan, of course bearing the burden of proof.

In support of this course of action we reject the several arguments raised on rehearing. The Supreme Court denial of our petition for certiorari of the *Mississippi Public Service Commission* decision, *supra* note 10, increases the need for the court in No. 74-2036 to issue its decision, but it does not warrant our prejudicing No. 74-2036. Moreover, while the appeal in No. 74-2036 is to the Commission's summary rejection of the compensation provision of the third interim settlement agreement, certain controlling legal precedents incumbent in any court decision in No. 74-2036 could impact upon the compensation proposals presently before the Commission. In addition, the Court of Appeals does retain jurisdiction over No. 74-2036, notwithstanding the "remand" language in the court's February 6, 1976, order, as it so stated in its recent remand order, *supra* note 11, slip op. at 7, n. 1. Furthermore, while compensation might raise serious questions of equity, it is not a necessary predicate to the establishment and implementation of Transco's permanent curtailment plan. Finally, we had examined the record evidence cited on rehearing favoring compensation before issuing Opinion No. 778. While this is some evidence, it is inadequate on its own for establishing a compensation provision. Questions of basic legal and equitable right to, the duration of, the mechanism for, and the quantum of compensation all require further evidence.

• • •

APPENDIX BB

Extracts From The Natural Gas Act

(15 U.S.C. 717, et seq.)

Sec. 4.(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. 15 U.S.C. 717c(b))

• • •

Sec. 7.(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. (15 U.S.C. 717f (a))

• • •

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. (15 U.S.C. 717f (g))

• • •

Sec. 19 (b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material

and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254). (15 U.S.C. 717r (a) and (b))

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Supreme Court, U. S.
FILED
SEP 13 1977
MICHAEL RODAK, JR., CLERK

No. 76-1799

In the Supreme Court of the United States

OCTOBER TERM, 1977

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ROBERT W. PERDUE,
Acting General Counsel,

JON G. LOTIS,
Assistant Litigation Counsel,
Federal Power Commission,
Washington, D.C. 20426.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

This case involves the Federal Power Commission's rejection of a proposed settlement agreement which determined natural gas entitlements of the customers of Transcontinental Gas Pipe Line Corporation ("Transco") for the period November 1974 through October 1975. The rejection was based on the plan's inclusion of a compensation scheme described below.

This case has previously been before this Court, when the Court summarily reversed an order by the court of appeals remanding the case to the Commission. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326. Transco now seeks certiorari from another remand order by that court issued November 29, 1976, which appears at Pet. App. A, pp. 1a-22a.

The settlement agreement at issue was filed by Transco in September 1974 and established an interim plan for the curtailment of gas deliveries to Transco's customers in 1974-1975 based on a shortage in Transco's supplies. The agreement embodied both a plan for the allocation of natural gas supplies among Transco's customers and a monetary compensation scheme under which customers who received more gas than the system-wide average would compensate customers who received less gas than the average.

The Commission found the compensation feature of the plan "patently unlawful," in part because "it would require high priority jurisdictional customers to pay increased rates which are unrelated to the pipeline's cost of service plus reasonable rate of return."[1] The Commission accordingly rejected the plan.

Transco then filed, under protest, an interim curtailment plan without the offending compensation feature. However, it also sought from the court of appeals an order directing the implementation of the 1974-1975 plan that the Commission had rejected. The court directed that the plan be placed in effect and that compensation payments under the plan be paid into an escrow account pending determination of the lawfulness of the compensation feature. *Consolidated Edison Co.* v. *Federal Power Commission*, 511 F. 2d 372, 381 (C.A. D.C.).

On August 1, 1975, after oral argument on petitions to review the Commission's order, the court of appeals directed the Commission to conduct an investigation into Transco's claim of need for curtailment. The court directed

[1]Order Finding An Emergency on Transco's System and Denying Motion for Interim Settlement As to Curtailment Rules, FPC Docket No. RP72-99 (November 12, 1974) at 13.

the Commission to subpoena Transco's books and records, conduct a field survey, and complete the investigation and report back to the court within 30 days (Pet. App. D, pp. 27a-34a). A stay of the court's order was obtained from this Court pending the filing and determination of a petition for a writ of certiorari. On January 19, 1976, this Court granted the petition and summarily reversed. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp., supra.*

This Court "agree[d] with the Court of Appeals that the existence of actual shortage of gas supplies forms the factual predicate necessary for the Commission's assertion of authority * * * to approve the curtailment of gas already contracted for." 423 U.S. at 331. However, the Court held that the court of appeals had exceeded its authority in "dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without the opportunity for further consideration on the basis of the new evidence by the agency." 423 U.S. at 333.

On the need for the inquiry, the Court stated (423 U.S. at 334):

> We are unable to determine with certainty, from this vantage point and on the partial record now before us, whether the evidence regarding Transco's actual shortage with which the instant order is concerned is absolutely essential to a decision by the Court of Appeals on the issues presently before that court for review. Although Judge MacKinnon in his separate statement was apparently of the view that it was not, it is at least conceivable that the Court of Appeals could determine that the lawfulness of the proposed compensation scheme is partially a function of the actual severity of the shortage. Cf. *FPC*

> v. *Louisiana Power & Light Co.* [406 U.S. 621]. Accordingly, the court below is free on remand either to proceed to the merits of the issues presented by the compensation scheme and only thereafter deal with the adequacy of the record in regard to the evidence of shortage, or immediately remand the case to the Commission for the required inquiry. It is apparent that under neither alternative need the Court of Appeals' ability fully and effectively to review the administrative process regarding the implementation of curtailment plans and their underlying factual premises be relinquished.

Noting "the potential importance of a resolution on the merits of the compensation issues presented by the instant case," this Court then remanded the case for "swift and priority consideration of this case by the Court of Appeals on remand * * *." 423 U.S. at 334-335.

On February 6, 1976, the court of appeals remanded the case to the Commission,[2] stating that it "* * * could [not] fairly consider 'the lawfulness of the proposed compensation scheme' unless the Commission has first fulfilled its duty to determine whether a real shortage exists * * *" (Pet. App. E, p. 39a). The court concluded that "'the evidence regarding Transco's actual shortage with which the instant order is concerned is absolutely essential to * * * decision' of the instant case" (*id.* at 38a). Judge MacKinnon dissented from this conclusion. He would have reached the merits and would have upheld the Commission's ruling that "the compensation scheme constituted an undue discrimination" (*id.* at 42a).

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[2] *Transcontinental Gas Pipe Line Corporation* v. *Federal Power Commission*, No. 74-2036, (D.C. Cir., February 6, 1976 (unpublished *per curiam*)) (Pet. App. E, pp. 35a-43a).

On June 25, 1976, the Commission issued its order on remand (Pet. App. F, pp. 44a-51a), finding (*id.* at p. 51a):

> Upon consideration of the mandate of the remand by the Court of Appeals and record evidence properly before the Commission we find that a natural gas supply shortage has in the past and continues to exist on Transco's system which has necessitated some curtailment of service to Transco's customers.

The next day, the Commission lodged the order with the court of appeals together with supporting documents, which included a stipulation by all of the parties to the Transco proceeding that Transco's available supply of natural gas "has been declining since 1971 and has been, and continues to be, insufficient to enable Transco to satisfy the certificated requirements of its customers" (Pet. App. H, p. 55a). The Commission also submitted the affidavit of Wayne M. Thompson, a Commission expert, who described the results of a deliverability study covering 18 randomly selected fields supplying 11.9% of Transco's available gas. Mr. Thompson's principal conclusion was that "for these 18 fields, Transco's deliverability estimates were reasonably accurate" (Pet. App. F, p. 50a). Mr. Thompson also stated "that a further [staff] review of 19 additional fields accounting for approximately 9% of Transco's gas supply did not change his opinion * * *" (Pet. App. H, pp. 55a-56a).

On November 29, 1976, the court of appeals issued the decision that this Court is now asked to review. The court again declined "to assess the legality of the compensation scheme at issue here" (Pet. App. A, p. 14a) and for the third time remanded the record to the Commission (Pet. App. A, pp. 1a-22a). Petitioner Transco seeks certiorari.

Central to the court of appeals' decision was its conclusion that the Commission's "deliverability study" was inadequate to determine the need for curtailment and, hence, for compensation (Pet. App. A, p. 10a):

> Diminished deliverability does not necessarily constitute substantial evidence of actual and legitimate long-term shortage if, for example, a pipeline or producer could, by more or less simple acts, make its proved reserves more deliverable. Similarly, diminished proved reserves may not support a finding of long-run shortage if by physically and economically achievable acts lying entirely within the control of a pipeline or producer, sizeable reservoirs of gas might be moved from the 'possible' or 'probable' categories into the category of 'proved reserves'.

Accordingly the court again (Pet. App. A, pp. 12a-13a) remanded the case to the Commission for development of—

> substantial information regarding the duration, shape, and causation of the shortage on the Transco system. Such information is simply not provided by deliverability data alone. We believe that the legality of compensation may well turn, at least in part, on answers to the following sorts of questions: Are sufficient volumes of gas available as proved or provable reserves so that greater total deliverability can be foreseen in the short-term future? Are present levels of curtailment likely to continue for the indefinite future, or to deepen? And more specifically: will compensation be a short-term financial adjustment between customers of the the pipeline to keep some of those customers financially afloat until the supply situation stabilizes, or wi.. it be a permanent cross-subsidization? We believe that without such

> information, neither the Commission nor the court can hope to give meaning to statutory terms such as "rates," "charges," and "classes of service" in a regulatory landscape vastly altered by end-use curtailment.

Judge MacKinnon again dissented. He noted that none of the parties had disputed the existence of a shortage in Transco's system, and observed that "the majority, apparently obsessed with the idea that there is no actual gas or oil shortage, have taken the bit in their teeth and *sua sponte* determined to compel the Commission to make an extensive and complex investigation, study and report on that issue" (Pet. App. A, pp. 15a-17a). Judge MacKinnon concluded that (Pet. App. A, pp. 21a-22a):

> * * * the majority are overcomplicating the case, unreasonably burdening the parties without any assurance that it is necessary to do so, and unreasonably delaying a decision on the facial validity of the compensation scheme.

On January 18, 1977, the court of appeals by an evenly divided vote denied the Commission's suggestion for rehearing *en banc* (Pet. App. B, pp. 23a-24a), and the panel denied the Commission's petition for rehearing (Pet. App. C, pp. 25a-26a).

Petitioner challenges the court of appeals' order on two grounds: first, that the court abused its discretion and overstepped the bounds of proper judicial review by ordering a remand to determine the "duration, shape, and causation" of the alleged shortage; and second, that given the Commission's finding that a natural gas shortage did exist on Transco's system, the "duration, shape, and causation" of such a shortage has no substantial bearing on the legality of the compensation scheme contained in Transco's curtailment plan (Pet. 7-12).

We agree with both contentions.

1. Under Section 19(b) of the Natural Gas Act, 52 Stat. 831, as amended, 15 U.S.C. 717r(b), a court of appeals reviewing a Federal Power Commission order has authority "to affirm, modify, or set aside such order in whole or in part." "But that authority is not power to exercise an essentially administrative function." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 21.

In its earlier decision in this case, *supra*, this Court held that the court of appeals by its initial remand order had "overstepped the bounds of its reviewing authority," which ordinarily "is to be confined to 'consideration of the decision of the agency * * * and of the evidence on which it was based,' *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 714-715 (1963)." 423 U.S. at 331. While the court of appeals this time has avoided some of its earlier errors (*e.g.*, by not setting a deadline for the Commission's investigation), it has again "propel[led] the court into the domain which Congress has set aside exclusively for the administrative agency. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)." 423 U.S. at 333.

The central issue in this proceeding is whether a curtailment plan that includes a compensation scheme by which customers receiving more gas than the system-wide average compensate those receiving less is unlawful under the Natural Gas Act. This is an important and recurring issue under the Act and needs to be resolved. The panel of the court of appeals in this case has put off resolving it for three years. The panel has now remanded to the Commission for the third time for an inquiry that not only thrusts the judiciary into the province of administrative agencies (and of legislative organs that are also considering the problem of energy supply), but that has no substantial relevance to the legal issue in this case.

2. The court-ordered inquiry would shed little light on the issues presented here. To be sure, this Court has stated that the "actual shortage of gas supplies forms the factual predicate necessary for the Commission's * * * authority * * * to approve the curtailment of gas already contracted for" (423 U.S. at 331), and that "it is at least conceivable that the Court of Appeals could determine that the lawfulness of the proposed compensation scheme is partially a function of the actual severity of the shortage" (*id.* at 334). But the necessary factual predicates have been amply established.

As noted above, pp. 4-5, *supra*, in response to the court's second remand of February 6, 1976, the Commission on June 26, 1976, submitted to the court its finding that "a natural gas supply shortage has in the past and continues to exist on Transco's system which has necessitated some curtailment of service to Transco's customers" (Pet. App. F, p. 51a). Supporting this finding were (1) a stipulation of all parties that during the 1974-1975 period covered by the compensation plan at issue, Transco's natural gas was "insufficient to enable Transco to satisfy the certificated requirements of its customers" (Pet. App. H, p. 55a), and (2) an unchallenged gas deliverability study by a Commission staff expert confirming the need for curtailment.

While the court of appeals disparaged the Commission's study as not "constitut[ing] substantial evidence of actual and legitimate long term shortage * * *" (Pet. App. A, p. 10a), evidence as to the long-term duration of the shortage has little if any relevance to the lawfulness of compensation during the 1974-1975 period to which the Commission's orders relate and in which there was a proved "actual * * * shortage." The Commission presented evidence based on its deliverability studies showing that "actual" curtailments did take place during that period and demonstrating the need

for such curtailments.[3] This finding is consistent with this Court's recognition in *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 626, of "a pattern of temporary and chronic natural gas shortages throughout the Nation." If, as the Commission found, there was an actual shortage of gas during the period in question, the necessary factual predicate for the determination of the validity of the compensation scheme is established. The case therefore called for that determination on the existing record.

3. Although the court of appeals' decision is incorrect, its effects appear to be limited to this case. A case currently pending before a different panel of the District of Columbia Circuit presents the issue of the lawfulness of compensation schemes similar to the scheme involved in this case.[4] On

[3]The court of appeals, however, on the basis of its view that the relevant inquiry should focus on the long-term duration of the shortage, concluded that the Commission's findings concerning Transco's capacity to *deliver* gas during the relevant period were insufficient, and that the Commission should determine such questions as whether, "by physically and economically achievable acts lying entirely within the control of a pipeline or producer, sizeable reservoirs of gas might be moved from the 'possible' or 'probable' categories into the category of 'proved reserves' " (Pet. App. A, p. 10a). "Gas which could be so moved" was designated by the majority as "provable" reserves. *Id.* at 10a, n. 3. But as Judge MacKinnon pointed out (*id.* at 15a-16a, n. 1), "possible," "probable" and "provable" reserves are not recognized concepts in the industry, and no party to the proceedings suggested the appropriateness of such an inquiry. The majority's inventiveness seems inconsistent with principles of judicial deference to the expertise of administrative agencies. Whatever the court may have meant by "provable" reserves, a transition from one category to another is wholly beyond the power of any pipeline customer, such as Transco, of a gas producer.

[4]*Elizabethtown Gas Co.* v. *Federal Power Commission*, D.C. Cir. No. 76-1465, argued June 17, 1977.

February 9, 1977, the court *sua sponte* asked the parties in that case, which had been placed in abeyance pending *Transco*, whether that case should be similarly remanded for the development of evidence as ordered by the panel in this case. The Commission opposed the remand on the ground that evidence of actual shortages on the gas-supply system involved in that case was undisputed (as it is in this case). By order of March 29, 1977, the court, apparently agreeing with the Commission, set the case for argument, and it was argued on June 17, 1977.

There thus appears to be a reasonable probability that the Commission will be able to obtain a ruling on the merits of the important issue of the lawfulness of such compensation schemes in the reasonably near future.[5] In that event, the inquiry ordered here, although burdensome and unnecessary, would not in itself be sufficiently important to warrant the Commission's seeking a writ of certiorari, although we do not oppose petitioner's petition. If the court of appeals in the pending case remands that case for an inquiry similar to that ordered by the panel in this case, the propriety of such action might well be sufficiently important to warrant this Court's review. Or if the court in that case fails for some other reason to rule on the lawfulness of the compensation scheme, the order of the present panel might assume sufficient importance to merit review.

Accordingly, we suggest that this Court defer ruling on the present petition for certiorari until the District of Columbia Circuit decides the pending case. When that

[5]Because of the relevance of the pending case, we sought and obtained an extension of time in which to file a petition for a writ of certiorari to and including June 17, 1977, and subsequently sought and obtained an extension of time in which to file a response to Transco's petition to and including August 23, 1977.

decision has been rendered, we will promptly file a memorandum supplementary to this one. While we recognize that the suggestion is unusual, we believe it is warranted by the unusual posture of this case. We have been authorized by counsel for petitioner to state that petitioner has no objection to this suggestion.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

ROBERT W. PERDUE,
Acting General Counsel,

JON G. LOTIS,
Assitant Litigation Counsel,
Federal Power Commission.

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No. 76-1799

In the Supreme Court of the United States

OCTOBER TERM, 1977

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ROBERT R. NORDHAUS,
General Counsel,

HOWARD E. SHAPIRO,
Solicitor,
Federal Energy Regulatory Commission,
Washington, D.C. 20426.

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SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION

This memorandum supplements a memorandum submitted on behalf of the Federal Power Commission in September 1977 in response to the petition for a writ of certiorari. The statement of the case is set forth more fully in that memorandum.

Briefly, the Commission ruled that a curtailment plan filed by petitioner was unlawful under the Natural Gas Act because it contained compensation provisions whereby customers who received more gas than the system-wide average were required to compensate those who received less than the average. The Commission believed those provisions were unlawful because, in effect, they established rates for certain purchasers that were unrelated to the pipeline's costs of service plus a

reasonable rate of return. Petitioner contended that the provisions were lawful, and sought judicial review of the Commission's order rejecting the plan.

The court of appeals in this case, however, has repeatedly declined to decide the issue of the lawfulness of the compensation scheme, on the ground that it could not determine whether the plan was lawful until the Commission undertook an extensive inquiry and developed "substantial information regarding the duration, shape and causation of the alleged shortage on the Transco system" (Pet. App. A, pp. 12a-13a). The court has remanded the case to the Commission three times for that purpose, notwithstanding that this Court, summarily reversing a prior remand order, directed the court of appeals to give the matter "swift and priority consideration * * *." *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 334-335.

In our memorandum filed in September 1977, we suggested that the Court defer ruling on the petition in this case because another case, also presenting the issue of the lawfulness of such a compensation scheme, was pending before a different panel of the court of appeals. *Elizabethtown Gas Co.* v. *Federal Energy Regulatory Commission*, C.A.D.C., No. 76-1465. In *Elizabethtown*, as in this case, the Commission had rejected proposals to include compensation provisions in interim curtailment plans of a natural gas pipeline company on the ground that it had no authority to require or approve curtailment plans that embodied such compensation provisions. In view of the pendency of *Elizabethtown*, it appeared reasonably likely that the Commission would be able to obtain a ruling from the court of appeals on the lawfulness of such compensation schemes in the reasonably near future.

On January 26, 1978, the court of appeals announced its decision in *Elizabethtown* (Supp. Memorandum of Transcontinental Gas Pipe Line Corp., Appendix). The court held that under the Natural Gas Act, 52 Stat. 821, as amended; 15 U.S.C. 717-717w, the Commission has authority to authorize compensation as part of a curtailment plan. The court adopted the rationale of *Mississippi Public Service Commission* v. *Federal Power Commission*, 522 F. 2d 1345 (C.A. 5), certiorari denied, 429 U.S. 870. Without vacating the Commission's orders, it remanded the case to the Commission to decide whether an interim curtailment plan should be adopted. On March 24, 1978, the court of appeals denied a petition by the pipeline for rehearing or clarification. The court stated in pertinent part:

> The opinion and order of this Court requires the Commission to consider whether compensation should be provided. What the Commission has the authority to do on remand is a different question from what it is required to do. The question of authority bears on the relationship between court and agency, *Compare, FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). It has not been considered by the Court previously, and we see no need for "clarification" of a matter that may or may not require a judicial ruling.

The Commission has decided not to seek review by this Court of the decision in *Elizabethtown*. That decision has established in the District of Columbia Circuit, to the Commission's satisfaction, that notwithstanding the Commission's rulings in *Elizabethtown* and this case, the Commission does have authority to approve the inclusion

of compensation schemes in curtailment plans.[1] Accordingly, we believe that there is no reason for further litigation of that issue in this case. Instead, we suggest that the case should be remanded to the Commission so that it may, as in *Elizabethtown*, "consider whether compensation should be provided."

The terms of the remand by the court of appeals in this case restrict the Commission to finding whether an actual shortage of gas supplies exists on the petitioner's system, as a factual predicate for determination by the court of appeals of the question that has now been decided in *Elizabethtown*. We submit that, in view of the decision in *Elizabethtown*, any need for that inquiry has been eliminated and the restriction should therefore be lifted.

We accordingly suggest that the petition for a writ of certiorari in this case should be granted, the order of the court of appeals remanding the record to the Commission for supplementation in accordance with the court's opinion of November 29, 1976, should be vacated, and the case should be remanded with instructions that the court

[1]While the Commission has decided not to seek this Court's review of the decision in *Elizabethtown*, the possibility exists that some other party to that case may do so. The time for petitioning for certiorari in *Elizabethtown* expires on June 22, 1978. (The Commission would oppose any such petition.)

of appeals return it to the Commission for the Commission to determine whether to authorize for the petitioner's system a curtailment plan with a compensation feature.[2]

Respectfully submitted,

WADE H. MCCREE, JR.,
Solicitor General.

ROBERT R. NORDHAUS,
General Counsel,

HOWARD E. SHAPIRO,
Solicitor,
Federal Energy Regulatory Commission.

MAY 1978.

[2]Petitioner, in its supplemental memorandum, requests that the case be remanded to the court of appeals "with directions to decide this case promptly on its merits" (Supp. Mem. 5). Since the court of appeals in *Elizabethtown* has decided the merits of the Commission's authority to approve compensation schemes, and since the Commission accepts that decision, we see no need to have the issue decided in this case as well.

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